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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] 61

CHARLES W. BAKER, ET AL., APPELLANTS,

vs.

JOE C. CARR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED MAY 26, 1960

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IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 2724

CHARLES W. BAKER, DAVID N. HARSH, EDMUND ORGILL, ROY DIXON, HERBERT S. ESCH, JACK W. LEE, MRS. JAMES M. TODD, W. D. HUDSON, GUY L. SMITH, and JOHN R. MCGAULEY, Plaintiffs,

vs.

JOE C. CARR, Secretary of State of State of Tennessee; GEORGE H. MCCANLESS, Attorney General of Tennessee; JERRY MCDONALD, Coordinator of Elections; and DR. SAM COWARD OF OVERTON COUNTY, TENNESSEE, JAMES ALEXANDER OF CARROLL COUNTY, TENNESSEE, and HUBERT BROOKS OF WASHINGTON COUNTY, TENNESSEE, Members Constituting the State Board of Elections, Defendants.

COMPLAINT—Filed May 18, 1959

Charles W. Baker, David N. Harsh, Edmund Orgill, Roy Dixon, Herbert S. Esch, Jack W. Lee, Mrs. James M. Todd, W. D. Hudson, Guy L. Smith, and John R. McGauley, plaintiffs above named, respectfully represent as follows:

I.

That this Court has original jurisdiction of this action, and that the plaintiffs have the right to bring this suit under the Civil Rights Act, 17th Stat. L. 13, and 16 Stat. L. 144; U. S. Code, Title 42, Secs. 1983 and 1988, as follows:

[fol. 6] "Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress." (R. S. Sec. 1979)

"Section 1988. Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, * * *" (R. S. Sec. 722)

Additionally, this Court has jurisdiction under 62 Stat. L. 932, 28 U.S.C. Section 1343 (3). This section reads as follows:

"Section 1343. Civil rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:—

* * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

II.

That, under 62 Stat. L. 968; 28 U.S.C. 2281 et seq., special provision is made for hearing causes of action involving restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state whenever said application is based on the unconstitutionality of such statute.

[fol. 7] III.

That the plaintiffs are citizens of the United States and of the State of Tennessee, and, as qualified voters in said State, are entitled to vote for the members of the Legislature of the State of Tennessee. In particular:

Plaintiff, *Charles W. Baker*, resides in Shelby County, Tennessee, is Chairman of the Shelby County Court, and is a qualified voter in said County;

Plaintiff, *David N. Harsh*, resides in Shelby County, Tennessee, is Chairman of the Shelby County Commission, and is a qualified voter in said County;

Plaintiff, *Edmund Orgill*, resides in the City of Memphis, Shelby County, Tennessee, is the Mayor of said said City, and is a qualified voter in said City and County;

Plaintiff, *Roy Dixon*, resides in Shelby County, Tennessee, and is a qualified voter in said County;

Plaintiff, *Herbert S. Esch*, resides in Memphis, Shelby County, Tennessee, and is a qualified voter in said City and County;

Plaintiff, *Jack W. Lee*, resides in Davidson County, Tennessee, and is a qualified voter in said County;

Plaintiff, *Mrs. James M. Todd*, resides in Davidson County, Tennessee, and is a qualified voter in said County;

Plaintiff, *Guy L. Smith*, resides in Knoxville, Knox County, Tennessee, and is a qualified voter in said City and County;

Plaintiff, *John R. McGauley*, resides in Hamilton County, Tennessee, and is a qualified voter in said County;

Plaintiff, *W. D. Hudson*, resides in Montgomery County, Tennessee, is a Judge of the County and Criminal Court of Montgomery County, and is a qualified voter in said County.

That the aforenamed plaintiffs jointly and severally bring this action on their own behalf and on behalf of all other voters in the State of Tennessee.

IV.

That the defendants are all citizens of the United States and of the State of Tennessee and reside within the said State. In particular:

[fol. 8] Defendant, *Joe C. Carr*, is the duly elected, qualified and acting Secretary of State of the State of Tennessee, with his office in Nashville in said State, and as such he is charged with the duty of furnishing blanks, envelopes and information slips to the County Election Commissioners, certifying the results of elections and maintaining the records thereof; and he is further ex officio charged, together with the Governor and the Attorney General, with the duty of examining the election returns received from the County Election Commissioners and declaring the election results, by the applicable provisions of the Tennessee Code Annotated, and by Chapter 164 of the Acts of 1949, inter alia.

Defendant, *George F. McCanless*, is the duly appointed and acting Attorney General of the State of Tennessee, with his office in Nashville in said State, and is charged with the duty of advising the officers of the State upon the law, and is made by Section 23-1107 of the Tennessee Code Annotated a necessary party defendant in any declaratory judgment action where the constitutionality of statutes of the State of Tennessee is attacked, and he is ex-officio charged, together with the Governor and the Secretary of State, with the duty of declaring the election results, under Section 2-140 of the Tennessee Code Annotated.

Defendant, *Jerry McDonald*, is the duly appointed Coordinator of Elections in the State of Tennessee, with his office in Nashville, Tennessee, and as such official, is charged with the duties set forth in the public law

enacted by the 1959 General Assembly of Tennessee creating said office.

Defendants, *Dr. Sam Coward, James Alexander*, and *Hubert Brooks* are the duly appointed and qualified members constituting the State Board of Elections, and as such they are charged with the duty of appointing the Election Commissioners for all the counties of the State of Tennessee, the organization and supervision of the biennial elections as provided by the Statutes of Tennessee, Chapter 9 of Title 2 of the Tennessee Code Annotated, Sections 2-901, et seq.

That this action is brought against the aforenamed defendants in their representative capacities, and that said Election Commissioners are sued also as representatives of all of the County Election Commissioners in the State of Tennessee, such persons being so numerous as to make it [fol. 9] impracticable to bring them all before the court; that there is a common question of law involved, namely, the constitutionality of Tennessee laws set forth in the Tennessee Code Annotated, Section 3-101 through Section 3-109, inclusive; that common relief is sought against all members of said Election Commissions in their official capacities, it being the duties of the aforesaid County Election Commissioners, within their respective jurisdictions, to appoint the judges of elections, to maintain the registry of qualified voters of said County, certify the results of elections held in said County to the defendants State Board of Elections and Secretary of State, and of preparing ballots and taking other steps to prepare for and hold elections in said Counties by virtue of Sections 2-1201, et seq. of Tennessee Code Annotated, and Section 2-301, et seq. of Tennessee Code Annotated, and Chapter 164 of the Acts of 1949, inter alia.

V.

That plaintiffs are now denied the right to equal suffrage in free and equal elections, which right is granted them by the Constitution of the State of Tennessee, and the equal protection of the laws, as guaranteed by both the Consti-

tution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States, and they bring this action on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated, under Chapter 11 of Title 23 of the Tennessee Code Annotated, Sections 23-1101, et seq. for a declaration of their rights and a declaration of the validity or invalidity of the private and public acts or statutes which apportion the representatives and senators among the coun- [fol. 10] ties of the State of Tennessee, and for such injunctive relief as may be proper to assure them and all other voters of the State of Tennessee free and equal franchise and equal protection of the laws which are now and have been for many years denied them by the defendants and their predecessors in office who have complied with certain unconstitutional statutes and private acts, all of which being particularly set forth herein.

VI.

That Article 14, Section 1 of the United States Constitution provides, in part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This provision of the Constitution of the United States contains a guarantee to the citizens of the right to vote in state elections and that their votes shall be equally effective with any other votes cast in said state elections.

VII.

That the Constitution of the State of Tennessee establishes, defines and guarantees to these plaintiffs, as well as to all other voters of the State of Tennessee, free and equal suffrage in free and equal elections by virtue of:

(1) Section 5 of Article I established the rights of these plaintiffs and all other qualified voters of Tennessee to free and equal elections and suffrage:

"Sec. 5. That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a Court of competent jurisdiction."

[fol. 11] (2) Section 1 of Article IV defines qualified voters who are guaranteed the right to free and equal elections and suffrage in Section 5 of Article I, supra:

"Section 1. Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage."

(3) Sections 4, 5, and 6 of Article II define the term "General Assembly" as used in this Constitution, prescribe the method by which its members shall be chosen and set out a formula which must be applied every ten years in apportioning the members of the General Assembly among the counties of the State in accordance with the number of qualified voters residing in each of the counties respectively:

"Sec. 4. An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

"Sec. 5. The number of Representatives shall, at the several periods of making the enumeration, be appor-

tioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member."

"Sec. 6. The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed one-third the number of Representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members of the House of Representatives, shall be made up to such county or counties in the Senate as near as may be practicable. When a district is composed of two or more counties they shall be adjoining, and no counties shall be divided in forming a district."

[fol. 12] The intent and purpose of the aforesaid provisions of the said Constitution is that the members of the legislature must be elected by the people of the State of Tennessee on a basis of fair and equal representation of the individual electors in said State and that said senators and representatives must be equally apportioned throughout the State in districts which are arranged in proportion to the qualified voters therein.

VIII.

That the plaintiffs, as citizens of the United States and of the State of Tennessee, have the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census.

That Sections 8 and 16 of Article XI of the Constitution of the State of Tennessee guarantee the rights of these plaintiffs and all other qualified voters of the State of Tennessee to equal suffrage in free and equal elections as established by Section 5 of Article I and defined in Section

1 of Article IV, Sections 4, 5 and 6 of Article II and Section 5 of Article XI by denying to the Legislature the power to grant special privileges and extraordinary rights to the residents of individual counties.

"Sec. 8. The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

"Sec. 16. The declaration of rights, hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained is excepted out of the general powers of the government, and shall forever remain inviolate."

[fol. 13] IX.

That the last reapportionment of the senatorial and representative districts was based on the 1900 Federal Census and was established by Chapter 122 of the Public Acts of Tennessee of 1901; this chapter now constitutes Sections 3-101 to 3-109 of the Tennessee Code Annotated. There have been five Federal enumerations of the population of the State of Tennessee since 1900, namely, 1910, 1920, 1930, 1940, and 1950. All of the Tennessee Legislatures after each such enumeration have been under a constitutional mandate in accordance with their oaths of office to support the Constitution of the United States and the Constitution of the State of Tennessee, described by Article II, Sections 4, 5, and 6, of the Tennessee Constitution, to reapportion said senatorial and representative districts in accordance with the result of the latest available enumeration. Since the Federal Census of 1910, there have been numerous regu-

lar and extra sessions of the Tennessee Legislature; however, each and every such Legislature, including the present Legislature up to the time of the issuance of this complaint, has failed to reapportion and readjust the boundaries of said districts, all in violation of the Constitution of the United States and the Constitution of the State of Tennessee.

X.

That since the 1870 Constitutional Convention and the constitutional apportionment of 1871, the Legislature of the State of Tennessee reapportioned itself three times, to-wit, in the years 1881, 1891, and 1901. But, since 1901, no Legislature of the State of Tennessee has ever reapportioned itself, pursuant to the mandate of Article II, Sections 4, 5, and 6 of the Tennessee Constitution, or otherwise, [fol. 14] except that certain minor modifications in the 1901 Legislative apportionment Act were made in some subsequent years to adjust the boundaries of certain individual districts in a manner not material to this proceeding.

XI.

That the plaintiffs, as citizens of the United States and the State of Tennessee, possess the inherent right to vote for members of the State Legislature and to cast votes that are equally effective with the votes of every other citizen of said State, that said rights are both recognized and guaranteed by the Constitution of the United States and the Constitution of the State of Tennessee, but that, because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901, the plaintiffs' votes are not as effective as the votes of the voters residing in other senatorial and representative districts in the State of Tennessee. The population of the State of Tennessee in 1900, based on the Federal Census of that year, was 2,021,00[illegible], while the population in 1950, based on the Federal Census of that year, was 3,292,000, and that the growth of the various counties of the State during this fifty year period has been very uneven.

XII.

That the Reapportionment Act, Chapter 122 of the Public Acts of Tennessee, passed February 2, 1901, ran its course and became unconstitutional and obsolete in 1911 by virtue of the explicit requirements of Sections 4, 5, and 6 of Article II that a new enumeration of qualified voters and a new apportionment of memberships in the General Assembly should be made in the year 1871 and within every subsequent term of ten years.

[fol. 15] XIII.

That the said Reapportionment Act of 1901, as amended, is unconstitutional because:

Said Act denies to Shelby County the additional number of Representatives and Senators to which Shelby County is entitled and upon which the plaintiffs Charles W. Baker, David N. Harsh, Edmund Orgill, Roy Dixon and Herbert S. Esch and their fellow voters are entitled to vote by virtue of the fact that Shelby County has had a sufficient number of qualified voters since prior to 1950 to entitle it to the additional representatives, as shown by Exhibits "A" and "B" hereto attached and made a part hereof.

Said Act denies to Davidson County the additional number of Representatives and Senators to which Davidson County is entitled and upon which the plaintiffs Jack W. Lee and Mrs. James M. Todd and their fellow voters are entitled to vote by virtue of the fact that Davidson County has had a sufficient number of qualified voters since prior to 1950 to entitle it to the additional Representatives, as shown by Exhibits "A" and "B" hereto attached and made a part hereof.

Said Act denies to Knox County the additional number of Representatives and Senators to which Knox County is entitled and upon which the plaintiff Guy L. Smith and his fellow voters are entitled to vote by virtue of the fact that Knox County has had a sufficient number of qualified voters since prior to 1950 to entitle it to the additional Representatives, as shown by Exhibits "A" and "B" hereto attached and made a part hereof.

Said Act denies to Hamilton County the additional number of Representatives and Senators to which Hamilton County is entitled and upon which the plaintiff John R. McGauley and his fellow voters are entitled to vote by virtue of the fact that Hamilton County has had a sufficient number of qualified voters since prior to 1950 to [fol. 16] entitle it to the additional Representatives, as shown by Exhibits "A" and "B" hereto attached and made a part hereof.

The Senatorial districts and counties, as they were fixed by the Act of 1901, as amended, and from which the members of the Senate and House of Representatives in the General Assembly are elected, are not divided in accordance with the number of voters in each of the counties and districts, as is illustrated by Exhibits "C" and "D" attached hereto and made a part hereof, and, therefore, the distribution of Senators and Representatives is arbitrary and contrary to the provisions of the Tennessee Constitution; that plaintiffs, and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly, and that they, and all others similarly situated, thereby are denied an equal right to suffrage in free and equal elections and equal protection of the laws required by the Constitution of the State of Tennessee in Section 5 of Article I, and in Sections 4, 5, and 6 of Article II and Sections 8 and 16 of Article XI thereof.

By a purposeful and systematic plan to discriminate against a geographical class of persons and deny them the equal protection of the law, these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.

XIV.

That the preceding paragraph is illustrative of the discrimination now made among the various electoral districts of the State of Tennessee; that when all inequalities are taken together, the violations of the particular constitutional provisions set out above and as shown in Exhibits

"C" and "D" result in a distortion of the constitutional system as established, defined, and guaranteed by the Con- [fol. 17] stitution of the State of Tennessee and the Fourteenth Amendment to the Constitution of the United States; that this distortion of our system of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee, since a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate, as shown by Exhibit "E" attached hereto and made a part hereof, and a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives, as shown by Exhibit "F" attached hereto and made a part hereof; and that thus a minority now rules in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the basic principle of representative government as set out in the Constitution of the State of Tennessee in Section 1 of Article I, "that all power is inherent in the people and all free governments are founded on their authority and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times an inalienable and indefeasible right to alter, abolish or reform the government in such manner as they think proper", and contrary to the philosophy of government in the United States and all Anglo-Saxon jurisprudence in which the legislature has the power to make law only because it has the power and duty to represent the people.

XV.

The constitutional requirements of the State of Tennessee can only be met by a distribution of the representatives and senators among the counties of the State of Tennessee in accordance with their respective qualified voters, and the [fol. 18] proper distribution of such representatives and senators may be proved mathematically by applying the constitutional formulae to the figures taken from the United States Census of 1950 showing the population of each County of the State of Tennessee, as approximately shown

in Exhibits "A" and "B" attached hereto and made a part hereof.

XVI.

That, for the purpose of informing the members of the 81st General Assembly of Tennessee of the intentions of the plaintiffs to seek reapportionment of the Legislature as is herein sought, plaintiffs, through their authorized attorneys at law, shortly after the convening of the 81st General Assembly of Tennessee in January, 1959, addressed to each member of the Senate and House of Representatives and mailed same to the mail addresses of all of said Senators and Representatives, the following Letter:

"Dear (Senator or Representative:

A number of citizens of Tennessee, especially interested in the proper apportionment of the Tennessee Legislature in accordance with the provisions of the State Constitution, have engaged attorneys at law to institute legal proceedings in the Federal Court if the present Tennessee Legislature does not enact legislation in conformity with the constitutional formula for reapportionment, and the undersigned are among the attorneys engaged for this purpose.

We feel that it is proper to notify you, as a member of the 1959 General Assembly, of the contemplated institution of this suit for reapportionment, which will be based, in material part, on the failure of the present legislature to carry out the mandate of our Constitution. We wish to assure you that there is nothing personal in our approach, as counsel, to the proper solution of this long standing problem, but we feel that you should have knowledge beforehand of the plan referred to in order to take appropriate action before the adjournment of the present legislature.

With every good wish,

Yours very truly,

/s/ Walter Chandler
Hobart Atkins"

[fol. 19] XVII.

That the 81st General Assembly of Tennessee adjourned on the 20th day of March, 1959, without passing any bill or resolution to reapportion itself in conformity with the Constitution of Tennessee, although a number of bills or resolutions for such purpose were introduced during said session, and the following bills were voted on and defeated by record votes:

Senate Bill No. 524, to reapportion the Tennessee General Assembly, failed of passage in the Senate by a vote of 14 Ayes and 18 Noes. A transcript of the journal of the Senate showing the action taken on said bill will be introduced at the hearing hereof.

Senate Bill No. 598, to reapportion the Tennessee Legislature in accordance with the constitutional formula, failed of passage in the Senate by a vote of 13 Ayes and 20 Noes. A copy of said bill and a transcript of the journal of the Senate showing the action taken thereon is annexed hereto as Exhibit "G" and made a part hereof.

House Bill No. 760, a companion bill of Senate Bill No. 598, to reapportion the Tennessee General Assembly, failed of action in the House of Representatives.

House Joint Resolution No. 76, to direct the Legislative Council "to make a study of the steps taken by other states in recent years to reapportion the membership of their legislative bodies among the several counties or districts of said states," failed of passage in the House of Representatives by a vote of 37 Ayes and 54 Noes.

[fol. 20] That by failing to pass the bills or adopting the resolution hereinabove mentioned, and by failing to enact a proper reapportionment law for the Legislature of 1961, as required by the provisions of the Constitution of Tennessee hereinabove cited, the 81st General Assembly of Tennessee continued the purposeful and systematic plan to discriminate against a geographic class of persons represented by the qualified voters enumerated in the Federal Census of 1950, thereby violating their solemn oaths to support the Constitution of Tennessee and the Constitution of the United States of America.

That by reason of the aforesaid failure of the 81st General Assembly of Tennessee to reapportion the legislative

districts of the State in conformity with the Constitution of Tennessee, thus violating the constitutional rights of these plaintiffs and depriving them and others of the equal protection of the laws, as hereinabove set forth, a serious justiciable controversy has arisen.

XVIII.

That the General Assembly of Tennessee, for a number of years, has denied to plaintiffs and others similarly situated the equal protection of the laws by unjustly discriminating against large segments of the population of the State in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the State through the exercise of the taxing power, as represented by statutes passed to raise and distribute revenues, notably for the support of the public schools of the State, counties, municipalities, and school districts, and for the maintenance of roads and highways, and for other purposes; that the said General Assembly, over a period of years, enacted and has maintained an arbitrary, unreasonable and discrim- [fol. 21] inatory formula for the making of contributions to the needs of County governments, in that, of the seven cents (7¢) collected by the State for the storage and sale of each gallon of gasoline, "a sum equal to that derived from the levy of two cents for each gallon" is paid into a separate fund known as "County Aid Funds", Section 54-403 of the Tennessee Code Annotated providing for the distribution of this fund in the following language:

> "Said 'county aid fund' so derived from the two cents (2¢) gasoline privilege tax, shall be divided and distributed by the department of highways and public works to the various counties of the state as follows: One-half (½) of said fund shall be distributed equally among the ninety-five (95) counties of the state, and fifty per cent (50%) of the balance shall be distributed among the ninety-five (95) counties on the basis of area and fifty per cent (50%) on basis of population, as of the most recent federal census, and shall be paid over monthly by the director of accounts of the state to the various county trustees, to be used by the county highway authorities in the building, repairing and improvement of county roads and bridges * * *";

that by Public Chapter No. 14 enacted by the 1959 General Assembly, provision was made for the distribution of the taxes collected in support of the educational system of the State, whereby the pattern established in previous years by said unlawfully apportioned general assemblies has been continued by fixing first what purports to be a formula whereby each county's and city's ability to contribute to the education of the children therein is determined, and thereinafter exempting by proviso those over-represented counties from all application of the formula and guaranteeing to them school funds in the amounts previously had by such counties, despite their failure to contribute to their own educational systems on the basis required by said formula for the counties in which plaintiffs and others similarly situated live, the final paragraph of the formula, the [fol. 22] exempting proviso, and the guarantee of funds appearing in subparagraph (4) of Section 4 of said Act, and reading as follows:

"Multiply each county's per cent of the total estimated value of taxable property determined as in subsection (3) of this section by Eighteen Million, One Hundred Twenty Thousand ($18,120,000.00) Dollars; and the product shall constitute the amount of funds which the county, as an equalizing county, shall raise, per annum, from local sources as its share of the cost of the minimum foundation school program for current operation and maintenance of the public schools, grades one through twelve; in no event, however, shall any county which was an equalizing county for the fiscal school year 1953-54 and which received State equalizing funds as such be required to raise during either fiscal school year of the biennium 1959-61 more money locally from all sources for school purposes than it did raise as a requirement for participation in State equalizing funds for the fiscal school year 1953-54; provided, however, that the additional amount of State funds represented by the 'guarantee' as set forth hereinabove in this subsection shall be limited to the amount of such 'guarantee' as calculated for the school year 1958-59.

"Where a county, city, or special school district receives Federal funds by virtue of being affected by the impact

of Federal installations, the State Board of Education is hereby authorized to increase the amount of local funds required for such school system to participate in State funds, as provided in subsection (4) of this section, by the total amount, or any part thereof, of Federal Funds so received.";

and that, in the allocation of sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes, and other taxes levied on the people of the State of Tennessee by such unlawfully apportioned General Assemblies, the discriminations provided in said statutes have been made possible and effective by the failure or refusal of the Legislatures of the State of Tennessee to follow the mandates of the State Constitution requiring the reapportionment of the General Assembly in each ten years after the year 1900.

[fol. 23]

XIX.

That the provisions of the formulae of the Constitution establishing and defining and guaranteeing the right to free and equal elections and equal suffrage to all are so far self-executing that the courts have complete jurisdiction to require the next election to be held in accordance with the constitutional formulae.

XX.

That the defendants, or their successors in office, unless prevented by this Court, will perform their duties as they and their predecessors in office have performed those duties for over fifty years under the unconstitutional Act of 1901, and the rights of these plaintiffs and all other qualified voters of Tennessee similarly situated, can be protected only by decree of this Court declaring the Act of 1901, together with all Acts amending it, to be unconstitutional, and by enjoining the defendants from holding another unconstitutional election in 1960, or thereafter, and by requiring either:

(a) that the defendants exercise their respective duties and prepare for the election of 1960 in such manner that

the election will be held at large over the State as a whole, whereby every qualified voter shall have the right to vote for every member of the Senate and House of Representatives to be elected to the 1961 General Assembly, or

(b) that the defendants obey a decree of this Court redistricting the State by mathematically applying the formulae set out in the Constitution by referring to the 1950 official Federal Census population figures of the various counties of the State, unless and until the General Assembly of the State of Tennessee, by proper law, reapportions [fol. 24] constitutionally the representatives and senators among the counties of the State.

Wherefore, Premises Considered, Plaintiffs respectfully pray that this Court take jurisdiction of this matter; that a special three-judge Court be called to hear and determine this cause as by law provided in 62 Stat. L. 968; 28 U.S.C. Sec. 2281, et seq., and declare the rights of the plaintiffs pursuant to 68 Stat. L. 890, 28 U.S.C. Sec. 2201, in the premises to-wit:

A. That the present legislative apportionment of the State of Tennessee has deprived and continues to deprive the plaintiffs of liberty and property without due process of law and has denied and continues to deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

B. That Sections 3-101 to 3-109, inclusive, of the Tennessee Code Annotated, are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of Tennessee because of the failure to reapportion the legislative districts of the State of Tennessee in accordance with present qualified voters as herein averred.

C. That the right of the plaintiffs to vote as guaranteed by Article 1, Section 5 and Article 4, Section 1 of the Constitution of the State of Tennessee has been impaired.

And plaintiffs further particularly pray that, after hearing of this action, the Court grant further relief in accordance with 62 Stat. L. 964, 28 U.S.C. Section 2202 as follows:

D. To restrain the defendants from furnishing forms for nominations, from receiving nomination petitions and papers, from certification of nominations or elections, and [fol. 25] from any other acts necessary to the holding of elections for members of the Tennessee Legislature in districts as established by Tennessee Code Annotated, Sections 3-101 to 3-109, inclusive, until such time as the said Legislature enacts legislation reapportioning the State senatorial and representative districts according to the Constitution of the State of Tennessee.

E. To direct the defendants to declare the next primary and general elections for members of the Tennessee Legislature on an at-large basis, and to direct them to take whatever further action is necessary to insure that all candidates for election to the 1961 session of the Tennessee Legislature run at-large throughout the entire State on the following basis: thirty-three (33) candidates for the State Senate receiving the highest number of votes shall be declared elected to the State Senate; and ninety-nine (99) candidates for the House of Representatives receiving the highest number of votes shall be declared elected to the House of Representatives; and said method of election to continue until such time as the said Legislature enacts legislation reapportioning the State senatorial and representatives districts according to the Constitution of the State of Tennessee.

F. For such other and further relief as may seem just, equitable and proper.

This is the first application for any extraordinary process in this cause.

Charles W. Baker, David N. Harsh, Edmund Orgill, [fol. 26] Roy Dixon, Herbert E. Esch, Jack W. Lee, Mrs. James M. Todd, Guy L. Smith, John R. McGauley, W. D. Hudson.

Denney, Leftwich & Osborn, Nashville, Tennessee, Hobart F. Atkins, Knoxville, Tennessee, Chandler, Manire and Chandler, Memphis, Tennessee, Attorneys for Plaintiffs.

[fol. 27] *Foregoing Complaint duly sworn to by plaintiffs, jurats omitted in printing.*

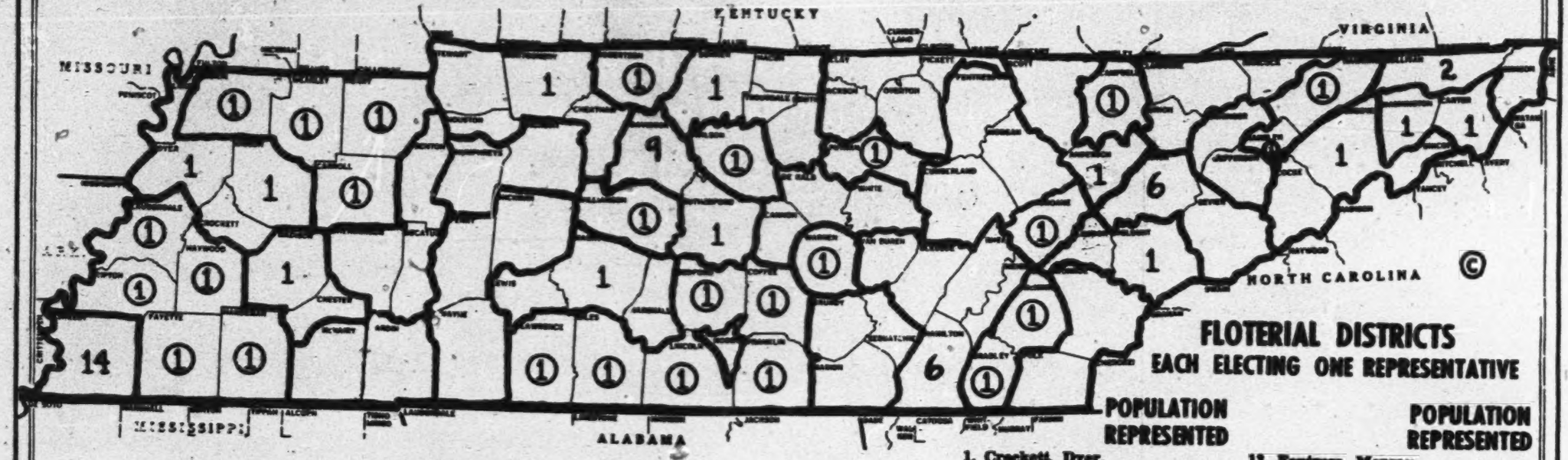
|| - INDICATES THE BOUNDARY BETWEEN THE 3 CONGRESSIONAL DISTRICTS OF EAST TENNESSEE, MIDDLE TENNESSEE, AND WEST TENNESSEE.

① - INDICATES THE COUNTY IS ENTITLED TO ELECT INDEPENDENTLY ONE REPRESENTATIVE BY VIRTUE OF THE TWO-THIRDS RULE SINCE IT HAS MORE THAN 13,325 BUT LESS THAN 19,985 VOTERS.

1,2,3, ETC. - INDICATES THE NUMBER OF REPRESENTATIVES THE COUNTY IS ENTITLED TO ELECT SEPARATELY.

| - INDICATES THE COUNTY, OR GROUP OF COUNTIES, THAT ELECT A REPRESENTATIVE.

A FAIR DISTRIBUTION OF THE SEATS IN THE HOUSE SHOULD GROUP THE COUNTIES AS SHOWN BELOW—



FLOTERIAL DISTRICTS
EACH ELECTING ONE REPRESENTATIVE

	POPULATION REPRESENTED
1. Crockett, Dyer, Gibson, Lake	25,252
2. Chester, Madison	22,651
3. Hardin, McNairy	21,178
4. Benton, Decatur, Henderson	22,785
5. Hickman, Perry, Wayne	18,485
6. Dickson, Humphreys	17,882
7. Cheatham, Houston, Montgomery, Stewart	19,884
8. Lewis, Marshall, Maury, Moore	21,612
9. Davidson, Rutherford	21,638
10. Macon, Smith, Sumner, Trousdale	20,214
11. Cannon, DeKalb, White	21,569
12. Clay, Jackson, Overton, Pickett	23,236

	POPULATION REPRESENTED
13. Fentress, Morgan, Cumberland	24,958
14. Bledsoe, Hamilton, Meigs, Rhea, Van Buren	20,219
15. Grundy, Marion Sequatchie	20,442
16. Monroe, Polk	20,214
15. Grundy, Marion, Sequatchie	20,442
17. Blount, Loudon	23,632
18. Anderson, Scott	22,432
19. Knox, Sevier	22,587
20. Grainger, Jefferson, Union	22,884
21. Claiborne, Hancock	17,589
22. Cocke, Greene, Unicoi	25,823
23. Carter, Washington	20,300
24. Johnson, Sullivan	20,420

TENNESSEE COUNTIES:

	1930 Voting Population	1930 Voting Population
Anderson	4,120	33,980
Bedford	5,777	14,732
Benton	2,712	7,023
Bledsoe	1,480	4,198
Blount	4,359	30,353
Bradley	3,667	18,375
Campbell	3,976	17,477
Cannon	2,781	5,341
Carroll	5,804	16,472
Carter	3,748	23,303
Cheatham	2,467	5,263
Chester	2,572	6,301
Claiborne	4,559	12,790
Clay	1,853	4,528
Cocke	4,972	12,572
Coffee	3,720	13,406
Crockett	3,556	9,876
Cumberland	2,237	9,503
Davidson	17,998	211,899
Decatur	2,206	5,563
DeKalb	3,884	8,984
Dickson	4,402	11,284
Dyer	5,935	20,082
Fayette	6,180	13,577
Fentress	1,231	7,057
Franklin	4,068	14,387
Gibson	9,486	30,833
Giles	7,565	15,906
Grainger	3,576	7,125
Greene	6,967	25,849
Grundy	1,737	6,549
Hamblen	2,987	14,000
Hamilton	16,882	131,971
Hancock	2,274	4,710
Hardeman	5,119	13,585
Hardin	4,567	9,577
Hawkins	5,182	18,980
Haywood	5,447	13,984
Henderson	4,860	10,199
Henry	5,873	15,486
Hickman	3,681	7,589
Houston	1,545	3,084
Humphreys	3,303	6,588
Jackson	3,178	6,719
James	1,581	
Jefferson	4,130	11,350
Johnson	2,211	6,649
Knox	19,849	140,550
Lake	1,972	6,202
Lauderdale	5,875	14,413
Lawrence	3,799	15,847
Lewis	1,875	3,413
Lincoln	5,259	15,082
Loudon	2,467	13,284
McMinn	4,378	16,347
McNairy	4,080	11,691
Macon	2,838	7,974
Madison	8,756	37,345
Marion	4,088	10,968
Marshall	4,591	11,388
Maury	11,266	34,568
Meigs	1,884	3,680
Monroe	4,088	12,884
Montgomery	8,712	30,384
Moore	1,333	2,340
Morgan	2,544	8,398
Obion	7,773	18,444
Overton	2,825	9,474
Perry	1,867	3,711
Pickett	1,135	2,585
Polk	2,879	7,209
Putnam	3,579	17,971
Rhea	3,405	8,957
Roane	5,470	17,620
Robertson	6,374	16,456
Rutherford	7,877	25,316
Scott	2,378	8,417
Sequatchie	788	2,984
Sevier	4,434	12,793
Shelby	43,843	312,345
Smith	4,372	8,731
Stewart	3,512	5,298
Sullivan	6,050	55,712
Sumner	6,304	20,143
Tipton	6,970	15,944
Trousdale	1,682	3,351
Unicoi	1,339	8,787
Union	2,841	4,689
Van Buren	780	2,020
Warren	3,884	13,337
Washington	5,488	30,997
Wayne	2,974	7,178
Weakley	7,882	18,697
White	3,118	9,244
Williamson	6,271	14,084
Wilson	6,550	16,650

TENNESSEE

[fol. 31]

EXHIBIT "A" TO COMPLAINT

[fol. 32]

EXHIBIT "B" TO COMPLAINT

(See opposite) ☞

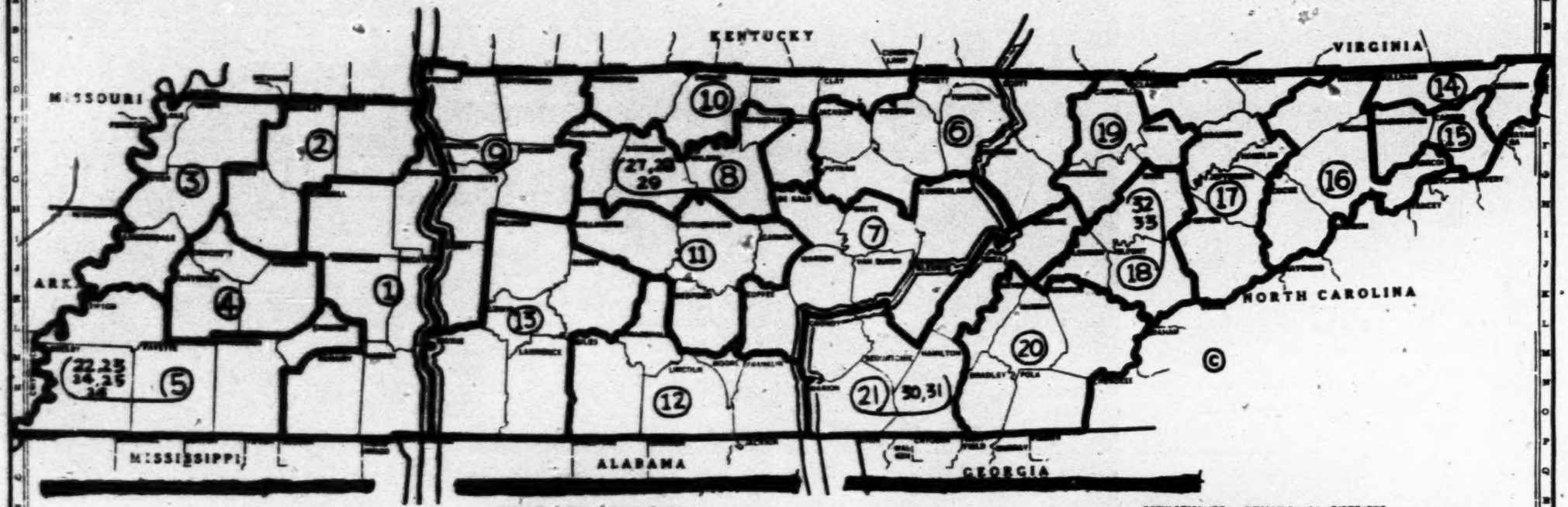
INDICATES THE BOUNDARY BETWEEN THE 3 CONGRESSIONAL DISTRICTS IN EAST TENNESSEE, MIDDLE TENNESSEE, AND WEST TENNESSE

INDICATES GROUP OF COUNTIES WHICH ELECT ONE SENATOR

(1), (2) ETC. INDICATES THE NUMBER OF THE SENATORIAL DISTRICT THAT ELECTS ONE SENATOR; THERE ARE 33 SENATORIAL DISTRICTS.

(21) (30,31) INDICATES A COUNTY THAT ELECTS 2 OR MORE SENATORS AND ALSO SHARES A SENATOR WITH OTHER COUNTIES.

A FAIR DISTRIBUTION OF SENATORS SHOULD GROUP THE COUNTIES INTO THE DISTRICTS SHOWN



TENNESSEE COUNTIES:

	1930 Voting Population	1930 Voting Population		1930 Voting Population	1930 Voting Population		1930 Voting Population	1930 Voting Population		1930 Voting Population	1930 Voting Population
Anderson	4,005	33,930	Fentress	1,331	7,057	Lake	1,972	6,252	Rhea	3,405	8,937
Bedford	5,777	14,732	Franklin	4,088	14,297	Lauderdale	5,075	14,613	Roane	5,479	17,829
Benton	2,712	7,402	Gibson	9,106	29,432	Lawrence	3,103	15,847	Robertson	6,271	16,456
Bledsoe	1,489	4,199	Giles	7,565	15,985	Lewis	988	3,613	Rutherford	7,677	25,316
Blount	4,350	20,350	Grainger	3,526	7,125	Lincoln	6,239	15,882	Scott	2,378	8,617
Bradley	5,887	18,273	Greene	6,867	23,649	Loudon	2,167	13,284	Sequatchie	788	2,984
Campbell	3,978	17,477	Grundy	1,737	6,540	McMinn	4,278	18,317	Sevier	4,434	12,788
Cannon	2,781	5,341	Hamblen	2,897	14,000	McNairy	4,989	11,891	Shelby	43,843	312,345
Carroll	5,804	16,472	Hamilton	16,882	131,971	Macon	2,938	7,974	Smith	4,372	8,731
Carter	3,718	20,269	Hancock	2,274	4,710	Madison	8,756	37,245	Stewart	3,512	5,228
Cheatham	2,467	5,283	Hardeman	5,119	13,565	Marion	4,868	10,898	Sullivan	6,656	36,712
Chester	2,372	6,381	Hardin	4,351	9,577	Marshall	4,501	11,288	Sumner	6,304	20,143
Claiborne	4,506	12,798	Hawkins	5,192	16,000	Maury	11,288	24,556	Tipton	4,979	15,944
Clay	1,853	4,528	Haywood	5,417	12,854	Meigs	1,484	3,009	Trousdale	1,482	3,351
Cocke	4,972	12,572	Henderson	4,090	10,190	Monroe	4,665	12,884	Unicoi	1,320	8,787
Coffee	3,720	13,496	Henry	5,873	15,495	Montgomery	8,712	26,284	Union	2,841	4,880
Crockett	3,556	8,870	Hickman	3,804	7,588	Moore	1,333	2,340	Van Buren	788	2,058
Cumberland	2,237	9,565	Houston	1,545	3,884	Morgan	2,544	6,308	Warren	3,804	13,337
Davidson	17,888	211,880	Humphreys	3,283	6,568	Obion	7,173	18,434	Washington	5,488	36,987
Decatur	2,308	5,583	Jackson	3,178	6,719	Overton	2,925	9,471	Wayne	2,974	7,178
Dekalb	3,858	8,884	James	1,281		Perry	1,957	3,711	Weakley	7,882	16,087
Dickson	4,402	11,284	Jefferson	4,130	11,358	Pickett	1,135	2,585	White	3,118	9,244
Dyer	5,935	20,082	Johnson	2,211	6,640	Polk	2,679	7,730	Williamson	6,271	14,884
Fayette	6,180	13,577	Knox	19,949	180,559	Putnam	3,679	17,071	Wilson	6,560	16,458

SCALE 0 5 10

POPULATION OF SENATORIAL DISTRICTS

1. BENTON, CROCKETT, DECATUR, HARDIN, HENDERSON, MCNAIRY - 60,435
2. GIBSON, HENRY, WEAKLY 63,304
3. DYER, LAKE, LAUDERDALE, OBION 99,171
4. CROCKETT, HAYWOOD, HARDEMAN 59,858
5. CHESTER, FAYETTE, HARDEMAN, SHELBY, TIPTON 62,067
6. PERTHERS, JACKSON, MORGAN, OVERTON, PICKETT, PUTNAM, SCOTT 59,611
7. BLEDSOE, COFFEE, CUMBERLAND, DEKALB, VAN BUREN, WARREN, WHITE 58,904
8. DAVIDSON, CHEATHAM, TROUSDALE, WILSON 97,158
9. DICKSON, HOUSTON, HUMPHREYS, MONTGOMERY, PERRY, STEWART 56,199
10. CLAY, MACON, ROBERTSON, SMITH, SUMNER 57,852
11. BEDFORD, CANNON, RUTHERFORD, WILLIAMSON 59,455
12. FRANKLIN, GILES, LINCOLN, MARSHALL, MOORE 58,952
13. MCMINN, LAWRENCE, LEWIS, MAURY, WAYNE 58,590
14. JOHNSON, SULLIVAN 62,341
15. CARTER, WASHINGTON 60,270
16. CLAIBORNE, GRAINGER, HAWKINS, UNICOI 61,908
17. CLAIBORNE, GRAINGER, HAWKINS, HANCOCK, JEFFERSON, SEVIER 62,776
18. BLOUNT, KNOX, LOUDON 84,266
19. ANDERSON, CAMPBELL, UNION 58,067
20. BRADLEY, MCMINN, MEIGS, MONROE, POLK 59,873
21. GRUNDY, HAMILTON, MARION, ROANE, RHEA, SEQUATCHIE 59,079
22-25. SHELBY, DAVIDSON, HAMILTON, KNOX 99,955

TENNESSEE

[fol. 33]

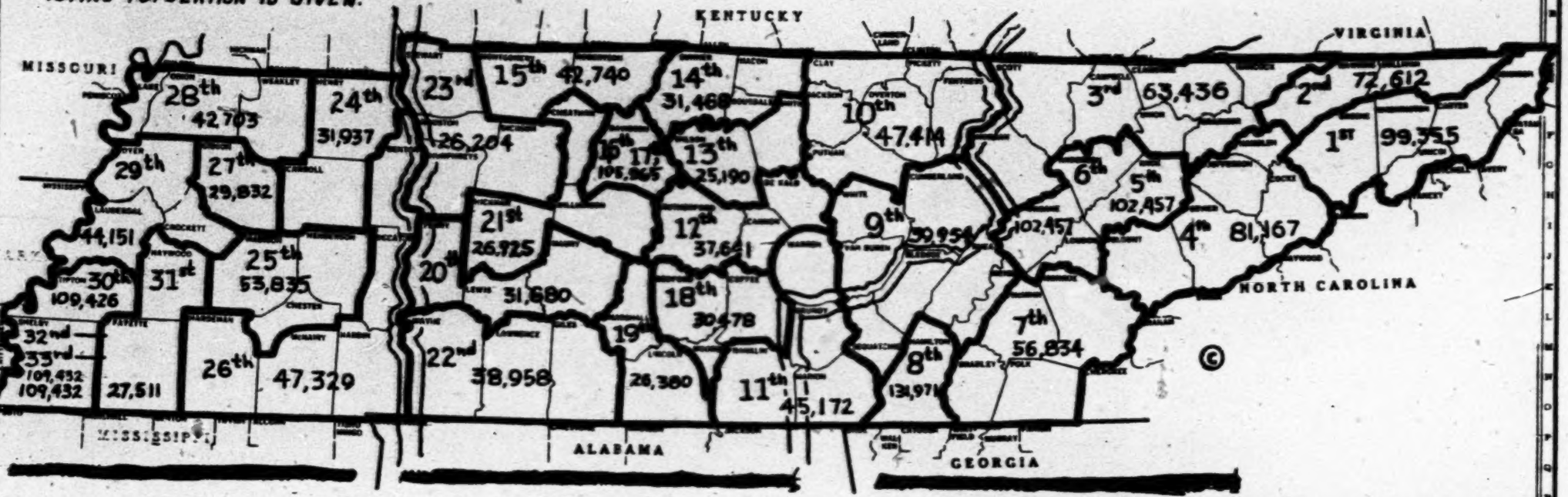
EXHIBIT "C" TO COMPLAINT

(See opposite) ☞

SENATORIAL DISTRICTS VARY BETWEEN 131,971 MOST (8th DIST.) AND 25,190 LEAST (13th DIST.)

THE TOTAL NUMBER OF VOTERS IN TENNESSEE IS 1,978,548.
WE ELECT 33 SENATORS. 1,978,548 ÷ 33 = 59,956.
THEREFORE COUNTIES SHOULD BE GROUPED TOGETHER IN SENATORIAL DISTRICTS SO THAT EACH DISTRICT HAS APPROXIMATELY 59,956

SENATORIAL DISTRICTS ARE OUTLINED IN BARS
THE DISTRICTS ARE NUMBERED AND THE APPROXIMATE VOTING POPULATION IS GIVEN.



[fol. 34]

EXHIBIT "D" TO COMPLAINT

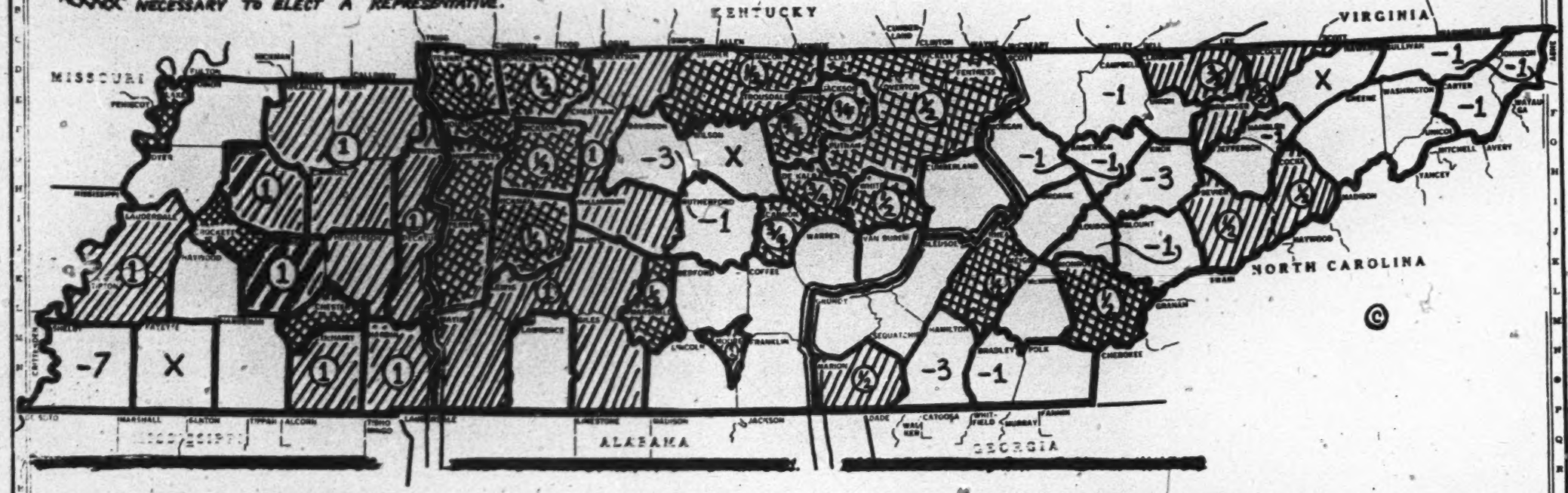
(See opposite) ☞



DISTRIBUTION OF THE 99 HOUSE SEATS UNDER THE ACT OF 1901

THE NUMBER OF VOTERS IN THE REPRESENTATIVE DISTRICTS VARIES BETWEEN 2,340 AND 42,298

- ▮ - INDICATES THE BOUNDARY BETWEEN THE 3 CONGRESSIONAL DISTRICTS OF EAST TENNESSEE, MIDDLE TENNESSEE, AND WEST TENNESSEE.
- ⬠ - COUNTIES LEFT BLANK HAVE APPROXIMATELY THE REPRESENTATION TO WHICH THEY ARE ENTITLED.
- (1) - INDICATES THE COUNTY OR FLOTERIAL DISTRICT HAS A REPRESENTATIVE TO WHICH IT IS NOT ENTITLED.
- -1 - INDICATES THE NUMBER OF REPRESENTATIVES TO WHICH THE COUNTY OR FLOTERIAL DISTRICT IS UNJUSTLY DENIED.
- X - INDICATES THAT THE COUNTY SHOULD HAVE ONLY ONE SEPARATE REPRESENTATIVE AND NOT BE JOINED IN A FLOTERIAL DISTRICT.
- (½) - INDICATES THE COUNTY HAS ONLY ½ OR ¼ OF THE POPULATION NECESSARY TO ELECT A REPRESENTATIVE.



THE TOTAL NUMBER OF VOTES IN TENNESSEE IS 1,978,548
WE ELECT 99 REPRESENTATIVES, 1,978,548 ÷ 99 = 19,985

THEREFORE COUNTIES SHOULD BE GROUPED TOGETHER IN REPRESENTATIVE DISTRICTS SO THAT EACH DISTRICT HAS APPROXIMATELY 19,985

TENNESSEE COUNTIES:

	1900 Voting Population	1900 Voting Population		1900 Voting Population	1900 Voting Population		1900 Voting Population	1900 Voting Population		1900 Voting Population	1900 Voting Population
Anderson	4,686	33,980	Fentress	1,331	7,057	Lake	1,972	6,253	Rhea	3,486	8,887
Bedford	5,777	14,722	Franklin	4,888	14,297	Lauderdale	5,075	14,413	Roane	6,570	17,880
Benton	3,713	7,895	Gibson	8,408	28,832	Lawrence	3,105	15,847	Robertson	6,274	16,488
Bledsoe	1,489	4,198	Giles	7,585	15,985	Lewis	886	3,413	Rutherford	7,877	28,196
Blount	4,359	20,353	Grainger	3,578	7,125	Lincoln	6,220	15,088	Scott	3,378	6,417
Bradley	3,867	18,273	Greene	6,987	23,649	Loudon	2,457	13,264	Sequatchie	1,788	3,884
Campbell	3,976	17,477	Grundy	1,737	6,540	McMinn	4,278	18,347	Sevier	4,484	13,798
Cannon	2,781	5,341	Hamblen	2,887	14,088	McNairy	4,080	11,801	Shelby	43,848	312,345
Carroll	5,886	16,472	Hamilton	14,882	131,971	Macon	3,856	7,874	Smith	4,572	8,721
Carter	3,749	20,320	Hancock	2,374	4,719	Madison	8,758	27,248	Stewart	3,513	8,288
Cheatham	2,467	5,353	Hardeman	5,119	13,565	Marion	4,066	10,886	Sullivan	6,888	22,772
Chester	2,572	6,591	Hardin	4,357	9,577	Marshall	4,581	11,366	Sumner	6,984	20,168
Claiborne	4,559	13,789	Hawkins	5,192	16,989	Maury	11,288	34,556	Tipton	6,898	15,044
Clay	1,853	4,526	Haywood	5,447	13,924	Meigs	1,884	3,888	Trousdale	1,482	3,581
Cocke	4,972	12,572	Henderson	4,888	10,180	Monroe	4,912	12,884	Unicoi	1,988	3,787
Coffee	3,729	13,488	Henry	5,973	15,488	Montgomery	5,713	28,284	Union	2,841	4,888
Crockett	3,566	9,878	Hickman	3,891	7,548	Moore	1,393	2,340	Van Buren	788	2,888
Cumberland	2,337	9,888	Houston	1,545	3,884	Morgan	3,544	6,888	Warren	5,884	13,337
Davidson	17,998	211,888	Humphreys	3,388	6,588	Obion	7,173	18,634	Washington	6,888	20,997
Decatur	2,258	5,583	Jackson	3,178	8,719	Overton	2,885	9,874	Wayne	2,974	7,178
Dekalb	3,856	8,884	James	1,381		Perry	1,857	5,711	Weakley	7,888	18,887
Dickson	4,602	11,384	Jefferson	4,139	11,350	Pickett	1,136	2,548	White	3,118	9,344
Dyer	5,885	20,883	Johnson	2,211	6,849	Polk	2,878	7,358	Williamson	6,371	14,884
Fayette	6,189	13,577	Knox	13,848	140,587	Putnam	3,879	17,871	Wilson	6,588	16,488

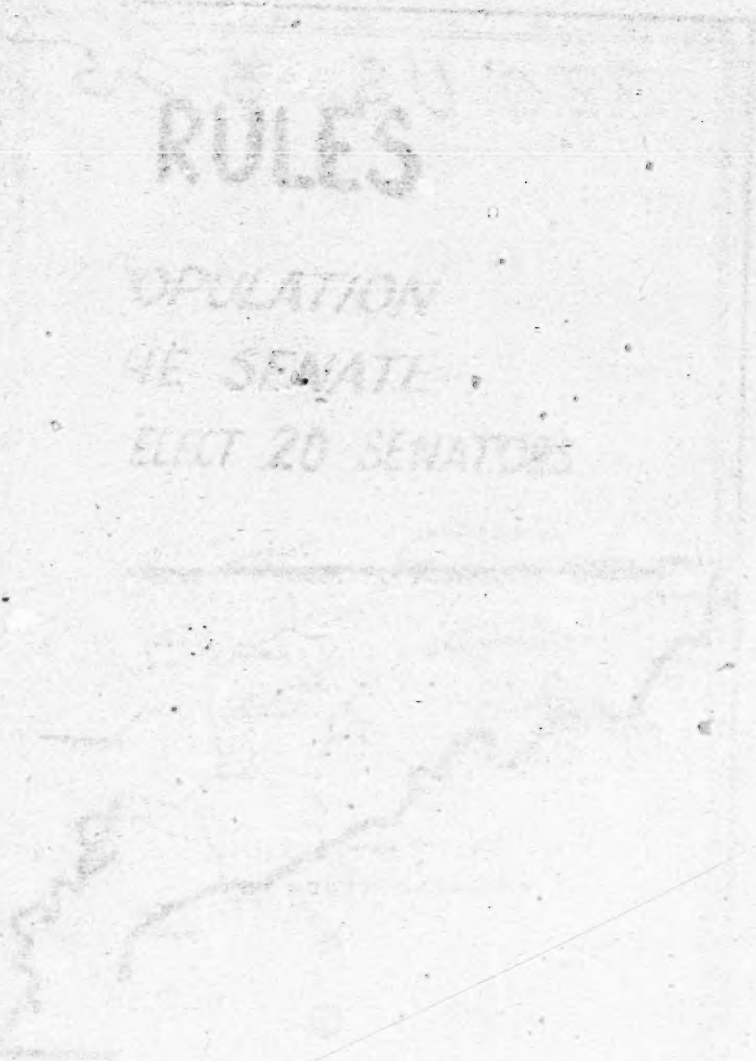
SCALE IN MILES 0 5 10 20 30 40

TENNESSEE

[fol. 35]

EXHIBIT "E" TO COMPLAINT

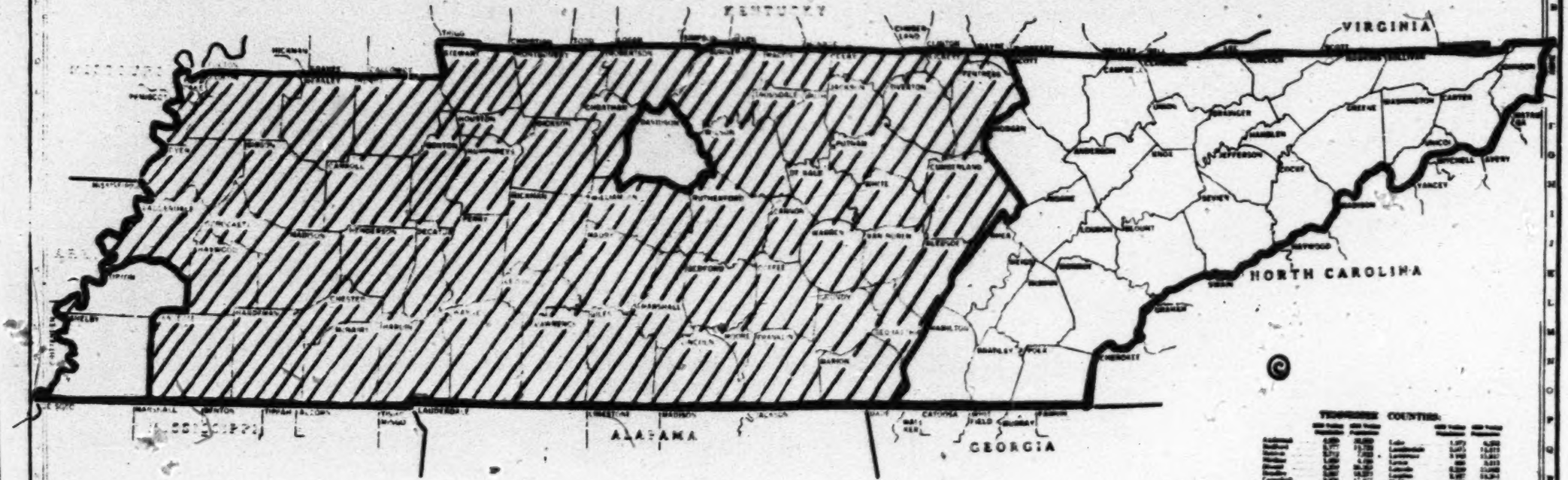
(See opposite) ☞


RULES
OPULATION
4E SENATE
ELECT 20 SENATORS

IN TENNESSEE MINORITY RULES

SHADED COUNTIES HAVE BUT 37% OF THE POPULATION
AND ELECT 20 OF THE 33 MEMBERS OF THE SENATE

63% OF THE VOTERS ELECT BUT 13 OF THE 33 SENATORS, 37% ELECT 20 SENATORS



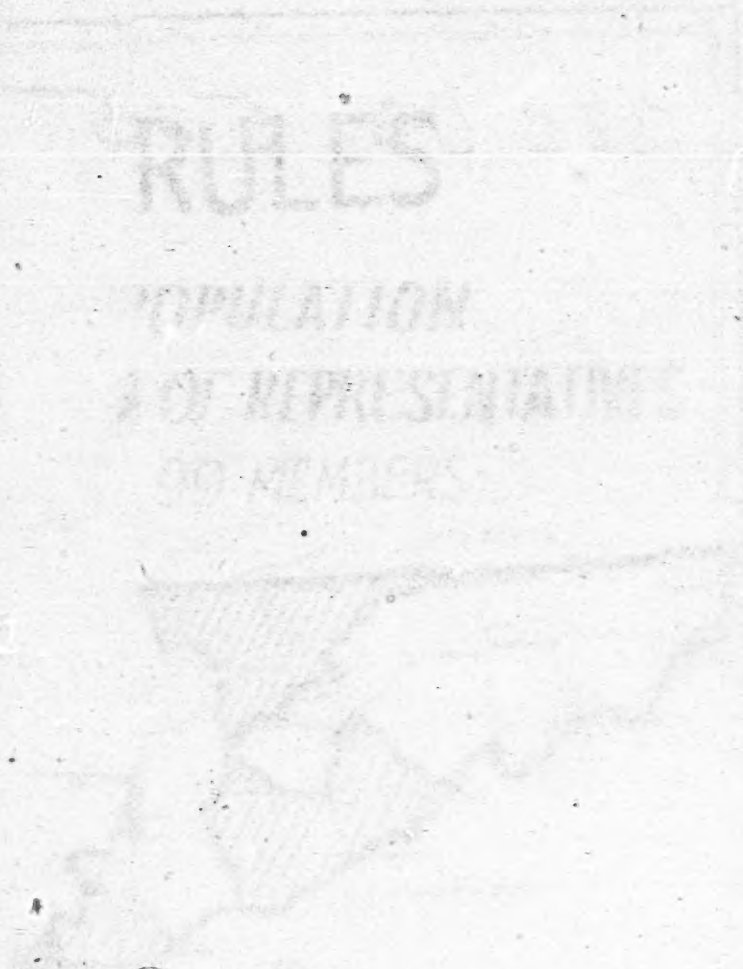


TENNESSEE

[fol. 36]

EXHIBIT "F" TO COMPLAINT

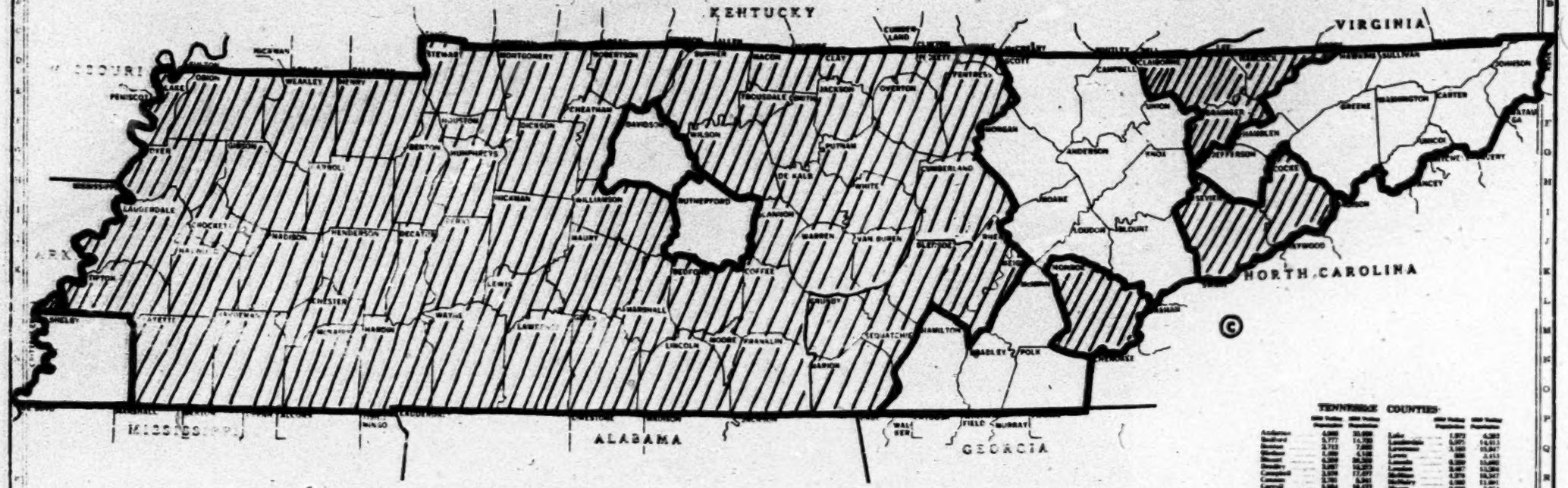
(See opposite)


RULES
POPULATION
OF REPRESENTATIVE
60 MEMBERS

IN TENNESSEE MINORITY RULES

SHADED COUNTIES HAVE BUT 40% OF THE POPULATION AND ELECT 63 OF THE 99 MEMBERS OF THE HOUSE OF REPRESENTATIVES

60% OF THE VOTERS OF TENNESSEE ELECT BUT 36 OF THE 99 MEMBERS



JUST OVER 60% OF THE VOTERS OF TENNESSEE RESIDE IN THE UNSHADED AREA AND ELECT BUT 36% OF THE SEATS OF THE HOUSE OF REPRESENTATIVES



TENNESSEE

[fol. 37]

EXHIBIT "G" TO COMPLAINT

(H.B. 760)
S.B. 598

A BILL TO BE ENTITLED: AN ACT TO REAPPORTION THE MEMBERSHIP OF THE HOUSE OF REPRESENTATIVES AND SENATE OF TENNESSEE IN THE MANNER PROVIDED IN THE CONSTITUTION OF THE STATE OF TENNESSEE BY AMENDING SECTIONS 3-101, 3-102, 3-103, 3-104, 3-105, 3-106, AND 3-107 OF CHAPTER 1 OF TITLE 3 OF THE TENNESSEE CODE, ANNOTATED, EFFECTIVE JANUARY 1, 1956.

Section 1. BE IT ENACTED by the General Assembly of the State of Tennessee that Sections 3-101, 3-102, 3-103, 3-104, 3-105, 3-106, and 3-107, as amended, of Chapter 1 of Title 3 of the Code of Tennessee, annotated, be amended so as to read as follows:

3-101. The general assembly of the State of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters, each of the following counties shall elect one (1) representative, to-wit: Anderson, Bedford, Blount, Bradley, Campbell, Carroll, Carter, Coffee, Dyer, Fayette, Franklin, Gibson, Giles, Greene, Hamblin, Hardeman, Hawkins, Haywood, Henry, Lauderdale, Lawrence, Lincoln, Madison, Maury, McMinn, Montgomery, Obion, Putnam, Roane, Robertson, Rutherford, Sumner, Tipton, Warren, Washington, Weakley, Williamson and Wilson.

3-102. The following county shall elect two (2) representatives, to-wit: Sullivan.

3-103. The following counties shall elect six (6) representatives each, to-wit: Knox and Hamilton.

3-104. Davidson County shall elect nine (9) representatives.

3-105. Shelby County shall elect fourteen (14) representatives.

[fol. 38] 3-106. The following counties jointly shall elect one (1) representative, as follows, to-wit:

First district	Johnson and Sullivan
Second district	Carter and Washington
Third district	Cocke, Greene and Unicoi
Fourth district	Grainger and Jefferson
Fifth district	Claibourne, Hancock and Union
Sixth district	Knox and Sevier
Seventh district	Anderson and Scott
Eighth district	Blount and Loudon
Ninth district	Monroe and Polk
Tenth district	Grundy, Marion and Sequatchie
Eleventh district	Fentress, Morgan and Cumberland
Twelfth district	Bledsoe, Hamilton, Meigs, Rhea and Van Buren
Thirteenth district	Clay, Jackson, Overton and Pickett
Fourteenth district	Macon, Smith, Sumner and Trousdale
Fifteenth district	Cannon, DeKalb and White
Sixteenth district	Davidson and Rutherford
Seventeenth district	Lewis, Marshall, Maury and Moore
Eighteenth district	Cheatham, Houston, Montgomery and Stewart
Nineteenth district	Dickson and Humphreys
Twentieth district	Hickman, Perry and Wayne
Twenty-first district	Benton, Decatur and Henderson
Twenty-second district	Hardin and McNairy
Twenty-third district	Chester and Madison
Twenty-fourth district	Crockett, Dyer, Gibson and Lake

3-107. Until the next enumeration and apportionment of voters, the following counties shall comprise the Senatorial district, and one senator shall be elected from each district, to-wit:

First district	Johnson and Sullivan
Second district	Carter and Washington
Third district	Cocke, Greene, Hawkins and Unicoi
Fourth district	Claibourne, Grainger, Hamblin, Hancock, Jefferson and Sevier
Fifth district	Knox
Sixth district	Knox
Seventh district	Knox, Blount, and Loudon
Eighth district	Bradley, McMinn, Meigs Monroe and Polk
Ninth district	Hamilton
Tenth district	Hamilton
Eleventh district	Hamilton, Grundy, Marion, Sequatchie, Rhea, and Roane
Twelfth district	Anderson, Campbell and Union
Thirteenth district	Fentress, Jackson, Morgan Overton, Putnam, Pickett, and Scott
Fourteenth district	Bledsoe, Coffee, Cumberland, DeKalb, Van Buren, Warren, and White

[fol. 39]

Fifteenth district	Clay, Macon, Robertson, Smith and Sumner
Sixteenth district	Davidson
Seventeenth district	Davidson
Eighteenth district	Davidson
Nineteenth district	Davidson, Cheatham, Trousdale, and Wilson
Twentieth district	Bedford, Cannon, Rutherford, and Williamson
Twenty-first district	Franklin, Giles, Lincoln, Marshall and Moore
Twenty-second district	Dickson, Houston, Humphreys, Montgomery, Perry and Stewart
Twenty-third district	Hickman, Lawrence, Lewis Maury and Wayne
Twenty-fourth district	Benton, Carroll, Decatur, Hardin, Henderson and McNairy

Twenty-fifth district	Crockett, Haywood and Madison
Twenty-sixth district	Gibson, Henry and Weakley
Twenty-seventh district	Dyer, Lake, Lauderdale and Obion
Twenty-eighth district	Shelby
Twenty-ninth district	Shelby
Thirtieth district	Shelby
Thirty-first district	Shelby
Thirty-second district	Shelby
Thirty-third district	Shelby, Chester, Fayette, Hardeman, and Tipton

Section 2. BE IT FURTHER ENACTED that the present representatives and senators elected to the present term of the legislature shall represent their respective counties and districts as constituted prior to this Act until the next general election of representatives and senators; and at the next general election for members of the General Assembly of Tennessee, and thereafter until changed by law, the representatives and senators elected shall represent, respectively, the counties and districts hereinabove provided for.

Section 3. BE IT FURTHER ENACTED that this Act shall take effect from and after its passage, the public welfare requiring it.

[fol. 40] I, L. B. Loser, Chief Clerk of the House of Representatives of the 81st General Assembly do hereby certify that this is a true copy of House Bill 760.

/s/ L. B. LOSER
Chief Clerk

[fol. 41]

TRANSCRIPT
OF
JOURNAL
OF
SENATE
OF
EIGHTY-FIRST GENERAL ASSEMBLY
OF
TENNESSEE
ON
SENATE BILL No. 598

[fol. 42]

THURSDAY, MARCH 5, 1959

SIXTIETH DAY

The Senate met at 10:00 A. M. and was called to order by Mr. Speaker Baird.

The proceedings were opened with prayer by Dr. James C. Blackwell, Pastor, Church of Christ of Centerville, Tennessee.

On motion, the roll call was dispensed with.

On motion, the reading of the Journal was dispensed with.

INTRODUCTION OF BILLS

By. Messrs. Mitchell (of Shelby), Cobb and Hughes, Senate Bill No. 598—To reapportion Tennessee General Assembly.

Passed first reading.

[fol. 43]

FRIDAY, MARCH 6, 1959

SIXTY-FIRST DAY

The Senate met at 9:00 A. M. and was called to order by Mr. Speaker Baird.

The proceedings were opened with prayer by Mr. Speaker Baird.

On motion, the roll call was dispensed with.

On motion, the reading of the Journal was dispensed with.

SENATE BILLS ON SECOND READING

Senate Bill No. 598—To reapportion Tennessee General Assembly.

Passed second reading and referred to Committee on Committees.

[fol. 44] THURSDAY, MARCH 12, 1959

SIXTY-SEVENTH DAY

The Senate met at 11:00 A. M. and was called to order by Mr. Speaker Baird.

The proceedings were opened with prayer by Reverend William B. Grannis, Pastor, St. Augustine Church of Chattanooga, Tennessee.

On motion, the roll call was dispensed with.

On motion, the reading of the Journal was dispensed with.

REPORT OF SELECT COMMITTEE

Mr. Speaker: Your Steering Committee begs leave to report that we have met and set the following bill on the calendar for Friday, March 13, 1959, Senate Bill No. 598.

Haynes, Chairman.

[fol. 45] TUESDAY, MARCH 17, 1959

SEVENTY-SECOND DAY

The Senate met at 10:00 A. M. and was called to order by Mr. Speaker Baird.

The proceedings were opened with prayer by Father Paul Trainer, Pastor, Holy Rosary Catholic Church of Donelson, Tennessee.

On motion, the roll call was dispensed with.

On motion, the reading of the Journal was dispensed with.

SENATE BILLS ON THIRD READING

Senate Bill No. 598—To reapportion Tennessee General Assembly.

Mr. Mitchell (of Shelby) moved for the previous question on Senate Bill No. 598, which motion prevailed by the following vote:

Ayes	27
Noes	0

Senators voting aye were: Messrs. Blackwell, Bockman, Boyers, Cobb, Coulter, Dement, Doggett, Eblen, Fulton, Glover, Guffey, Haynes, Hughes, Knippers, Larkin, McGrath, Mitchell (of Overton), Mitchell (of Shelby), Moore, Oakes, O'Brien, Padgett, Peters, Robinson, Sipes, Wilder and Mr. Speaker Baird—27.

Thereupon, Senate Bill No. 598 failed for the lack of a constitutional majority by the following vote:

Ayes	13
Noes	20

Senators voting Aye were: Messrs. Cash, Cobb, Coulter, Eblen, Fulton, Guffey, Hughes, McGrath, Mitchell (of Shelby), Murray, Oakes, Peters and Robinson—13.

Senators voting no were: Messrs. Blackwell, Bockman, Boyers, Dement, Dennis, Doggett, Glover, Haynes, Hunt, Kelley, Knippers, Larkin, McLemore, Mitchell (of Overton), Moore, O'Brien, Padgett, Sipes, Wilder and Mr. Speaker Baird.—20

[fol. 46] CERTIFICATE

I, John W. Cooke, Jr., Chief Clerk of the Senate of the Eighty-first General Assembly of the State of Tennessee, do hereby certify that the foregoing is a full, true and complete transcript of the proceedings of the Senate of the Eighty-first General Assembly, insofar as it pertains to the introduction and consideration of Senate Bill No. 598.

This, the 14th day of April, 1959.

JOHN W. COOKE, JR.
John W. Cooke, Jr., Chief Clerk
Senate

[fol. 47]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendants: Joe C. Carr, State Capitol, Nashville, Tennessee, and George H. McCanless, Supreme Court Bldg., Nashville, Tenn.

You are hereby summoned and required to serve upon Hon. Denney, Leftwich & Osborn, Attorneys at Law, Nashville Trust Building, Nashville 3, Tennessee; Hon. Hobart F. Atkins, 410 Cumberland Ave., South West, Knoxville, Tennessee; Hon. Chandler, Manire and Chandler, Home Federal Building, Memphis 3, Tennessee, plaintiffs' attorneys, whose addresses are listed herein, an answer to the complaint which is herewith served upon you, within Twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John O. Anderson, Clerk of Court, Frank Williams, Deputy Clerk.

Date: May 18, 1959.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 47a]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 25 day of May, 1959, I received this summons and served it together with the complaint herein as follows:

By delivering a copy thereof to Joe C. Carr, at His Office, Nash., Tenn.

By delivering a copy thereof to George H. McCanless, at His office, Nash., Tenn. both on May 25, 1959

[Stamp—Filed June 3, 1959—John O. Anderson, Clerk, By Frank Williams, D. C.]

Herbert E. Patrick, United States Marshal, By Jack M. Irwin, Deputy United States Marshal.

MARSHAL'S FEES

Travel 2 mi.	$ .20
Service 2 Fees	4.00
Billed	4.20

[fol. 48]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: JERRY MCDONALD, c/o Secretary of State's Office, State Capitol Building, Nashville, Tennessee.

Hon. Denney, Leftwich & Osborn, Nashville Trust Building, Nashville 3, Tennessee; Hon. Hobart F. Atkins, 410 Cumberland Ave., South West, Knoxville, Tennessee; Hon. Chandler, Manire and Chandler, Home Federal Building, Memphis 3, Tennessee, plaintiffs' attorneys, whose addresses are listed herein, an answer to the complaint which is herewith served upon you, within Twenty (20) days after service of this summons upon you, exclusive of the day of

service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John O. Anderson, Clerk of Court, Frank Williams, Deputy Clerk.

Date: May 18, 1959.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 48a]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 25 day of May, 1959, I received this summons and served it together with the complaint herein as follows:

By delivering a copy thereof to Jerry McDonald, at His office, Nash., Tenn. on May 25, 1959

[Stamp—Filed June 3, 1959—John O. Anderson, Clerk, By Frank Williams, D. C.]

Herbert E. Patrick, United States Marshal, By Jack M. Irwin, Deputy United States Marshal.

MARSHAL'S FEES

Travel.....	$.....
Service Fees	2.00
Billed	2.00

[fol. 49]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: DR. SAM COWARD, Livingston, Tennessee:

You are hereby summoned and required to serve upon Hon. Denney, Leftwich & Osborn, Attorneys at Law, Nashville Trust Building, Nashville 3, Tennessee; Hon. Hobart F. Atkins, 410 Cumberland Ave., South West, Knoxville, Tennessee; Hon. Chandler, Manire and Chandler, Home Federal Building, Memphis 3, Tennessee, plaintiffs' attorneys, whose addresses are listed herein, an answer to the complaint which is herewith served upon you, within Twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John O. Anderson, Clerk of Court, Frank Williams, Deputy Clerk.

Date: May 18, 1959.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 49a]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 19th day of May, 1959, I received this summons and served it together with the complaint herein as follows:

By leaving copy of summons and copy of complaint with Dr. Sam Coward at his home Livingston, Tennessee

This May 19, 1959

[Stamp—Filed May 25, 1959—John O. Anderson, Clerk, By Frank Williams, D. C.]

Herbert E. Patrick, United States Marshal, By Willie W. Beaty, Deputy United States Marshal.

MARSHAL'S FEES

Travel 202 mi.	$ 20.20
Service.....	2.00
	22.20
Billed	22.20

[fol. 50]

[Stamp—Received May 20, 1959—U. S. Marshal, Memphis, Tenn.]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: JAMES ALEXANDER, McKenzie, Tennessee:

You are hereby summoned and required to serve upon Hon. Denney, Leftwich & Osborn, Attorneys at Law, Nashville Trust Building, Nashville 3, Tennessee; Hon. Hobart F. Atkins, 410 Cumberland Ave., South West, Knoxville, Tennessee; Hon. Chandler, Manire and Chandler, Home Federal Building, Memphis 3, Tennessee, plaintiffs' attorneys, whose addresses are listed herein, an answer to the complaint which is herewith served upon you, within Twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John O. Anderson, Clerk of Court, Frank Williams, Deputy Clerk.

Date: May 18, 1959.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 50a]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 25th day of May, 1959, I received this summons and served it together with the complaint herein as follows:

By serving Mrs. James Alexander—who accepted service for her husband, James Alexander, who was out of town—and leaving with her copies of complaint and summons on the 26th day of May, 1959.

[Stamp—Filed June 3, 1959—John O. Anderson, Clerk, By Frank Williams, D. C.]

John T. Williams, United States Marshal, By Ira W. Helm, Deputy United States Marshal.

MARSHAL'S FEES

Travel	$	9.00 (90 miles at 10¢)
Service		2.00
Billed	$	11.00

[fol. 51]

[Stamp—Received—U. S. Marshal, Eastern Dist. of Tenn. —May 19, 1959]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: HUBERT BROOKS, Johnson City, Tennessee:

You are hereby summoned and required to serve upon Hon. Denney, Leftwich & Osborn, Nashville Trust Building, Nashville 3, Tennessee; Hon. Hobart F. Atkins, 410 Cum-

berland Ave., South West, Knoxville, Tennessee; Hon. Chandler, Manire and Chandler, Home Federal Building, Memphis 3, Tennessee, plaintiffs' attorneys, whose addresses are listed herein, an answer to the complaint which is herewith served upon you, within Twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John O. Anderson, Clerk of Court, Frank Williams, Deputy Clerk.

Date: May 18, 1959.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 51a]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 19th day of May, 1959, at Knoxville, Tennessee I received this summons and served it together with the complaint herein as follows:

By handing to and leaving with Mr. Hubert Brooks at 309 W. Watauga Ave., Johnson City, Tennessee a copy of the summons and complaint on June 11, 1959.

[Stamp—Filed June 15, 1959—John O. Anderson, Clerk, By Frank Williams, D. C.]

Frank Quarles, United States Marshal, By Joseph E. Farmer, Deputy United States Marshal.

MARSHAL'S FEES

Travel	$ 20.00
Service	$ 2.00
	$ 22.00

[fol. 52]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION OF JOE C. CARR, ET AL. TO DISMISS ACTION
—Filed June 8, 1959

The defendants, Joe C. Carr, Secretary of State of the State of Tennessee, George F. McCanless, Attorney General of Tennessee, Jerry McDonald, Coordinator of Elections, and Dr. Sam Coward, and James Alexander, two members of the State Board of Elections, move the Court as follows:

1. To dismiss the action because the Court lacks jurisdiction over the subject matter.

2. To dismiss the action because the complaint fails to state a claim upon which relief can be granted.

[fol. 53] 3. To dismiss the action because of failure to join indispensable parties.

Milton P. Rice, Assistant Attorney General, Jack Wilson, Assistant Attorney General, James M. Glasgow, Assistant Attorney General, Allison B. Humphreys, Solicitor General, Attorneys for defendants, 401 Seventh Avenue North, Nashville, Tennessee.

Certificate of Service (omitted in printing).

[fol. 54]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION OF HUBERT BROOKS TO DISMISS THE ACTION
—Filed June 12, 1959

Defendant Hubert Brooks, a member of the State Board of Elections, adopts the motion of the other defendants to the action and moves the Court:

1. To dismiss the action because the Court lacks jurisdiction over the subject matter.

2. To dismiss the action because the complaint fails to state a claim upon which relief can be granted.

3. To dismiss the action because of failure to join indispensable parties.

Milton P. Rice, Assistant Attorney General, James M. Glasgow, Assistant Attorney General, Jack Wilson, Assistant Attorney General, Allison B. Humphreys, Solicitor General, Attorneys for defendants.

[fol. 55] Certificate of Service (omitted in printing).

[fol. 56]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION OF JOE C. CARR, ET AL. TO DISMISS THE ACTION WITHOUT ASSEMBLING A THREE-JUDGE COURT
—Filed June 17, 1959

Come the defendants, Joe C. Carr, Secretary of State of the State of Tennessee, George F. McCanless, Attorney General of Tennessee, Jerry McDonald, Coordinator of Elections, and Dr. Sam Coward, James Alexander and Hubert Brooks, members of the State Board of Elections, not waiving their motion to dismiss heretofore filed but relying thereon, and move the Court as follows:

To dismiss the action without assembling a three-judge court upon the ground the action does not raise a substantial federal question.

Milton P. Rice, Assistant Attorney General, James M. Glasgow, Assistant Attorney General, Jack Wilson, Assistant Attorney General, Allison B. Humphreys, Solicitor General, Attorneys for Defendants, 401 Seventh Avenue North, Nashville 3, Tennessee.

[fol. 57] Certificate of Service (omitted in printing).

[fol. 58]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

AFFIDAVIT OF JAMES M. GLASGOW AS TO JURISDICTIONAL PAPERS FILED IN SUPREME COURT OF THE UNITED STATES IN CASE OF KIDD, ET AL. V. MCCANLESS, NO. 469 OCTOBER TERM 1956—Filed July 6, 1959

I, James M. Glasgow, Attorney at Law, 401 Seventh Avenue North, Supreme Court Building, Nashville, Tennessee, being duly sworn, depose as follows:

That I was counsel of record in the case styled Gates Kidd, et al., Complainants-Appellants, v. George F. McCanless, Attorney General, Defendant-Appellee, in the Chancery Court at Nashville, in the Supreme Court of Tennessee, and in the Supreme Court of the United States, and that the Jurisdictional Statement and the Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss, which are being tendered to the Court for consideration in connection with the Motion to Dismiss without assembling a three-judge court, are true, accurate, and exact duplicates of the Jurisdictional Statement and the Statement in Opposition, and the Motion [fol. 59] to Dismiss, filed in the Supreme Court of the United States in said case of Kidd v. McCanless.

Witness my hand this 2nd day of July, 1959.

James M. Glasgow

Subscribed and sworn to before me, this 2nd day of July, 1959.

Glenn E. Frazier, Notary Public. My Comm. Exp. 5/7/63.

[Notarial Seal]

• • • • • • •

[fol. 61]

ATTACHMENT TO AFFIDAVIT OF JAMES M. GLASGOW

IN THE SUPREME COURT OF THE UNITED STATES

No. 36651

IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

GATES KIDD, ET AL., Appellants,

vs.

GEORGE F. McCANLESS, Appellee.

JURISDICTIONAL STATEMENT

May It Please The Court:

Reference to Report of Opinion in Court Below

Unofficial report of the opinion delivered by the Supreme Court of Tennessee in the above styled and numbered case is published in 292 S. W. 2d at page 40; Advance Sheet No. 1, 292 S. W. 2d, dated August 21, 1956. Said opinion and the opinion of the Supreme Court of Tennessee, denying appellants' petition to rehear, is appended hereto.

[fol. 62] Grounds on Which Jurisdiction is Invoked

I.

The proceeding is an appeal where is drawn in question the validity of a statute of the State of Tennessee on the ground that it is repugnant to the Constitution of the United States, the decision of the Supreme Court of Tennessee, from which appeal is had, being in favor of the validity of the Tennessee statute.

II.

The decree sought to be reviewed was made and entered by the Supreme Court of Tennessee on April 5, 1956. Order

denying appellants' petition for a rehearing was made and entered on June 8, 1956. Notice of appeal was filed in the Supreme Court of Tennessee on July 19, 1956.

III.

Section 1257, Title 28, U.S.C., subsection (2) permits review by the Supreme Court of the United States of a judgment or decree of the Supreme Court of Tennessee by appeal, in a case in which the validity of a state statute is questioned for its repugnancy to the Constitution of the United States and decision in favor of the validity of the questioned statute is rendered by the Supreme Court of Tennessee.

[fol. 63] IV.

The following cases are believed to sustain the jurisdiction of this Honorable Court:

1. *Snowden* v. *Hughes,* 321 U.S. 1
2. *McPherson* v. *Blacker,* 146 U.S. 1
3. *Nixon* v. *Herndon,* 273 U.S. 536
4. *Nixon* v. *Condra,* 286 U.S. 73
5. *Thomas* v. *Reid,* 142 Oklahoma 38, 285 Pacific 92
6. *Cook* v. *State,* 90 Tenn. 407, 116 S.W. 471
7. *Maynard* v. *Board of Canvassers,* 84 Michigan 228, 47 N.W. 756.
8. *Dyer* v. *Kanzuhisa Abe,* 138 F. Supp. 220.

V.

The validity of certain statutes of Tennessee is involved. Said statutes, sections 3-101–3-107, inclusive, Tennessee Code Annotated, are published in the Official Edition of the Tennessee Code Annotated in Volume 2, pages 186, 187 and 188 of said Code. Together, they provide for apportionment of seats in the General Assembly of Tennessee. Being lengthy, the texts of said statutes are set forth in the appendix hereto.

[fol. 64] **Questions Presented by the Appeal**

The Constitution of Tennessee requires the making of an enumeration of qualified voters and an apportionment of representatives and senators in the General Assembly every ten years. The representatives and senators of the General Assembly are to be "apportioned among the several counties or districts, according to the number of qualified voters in each." Acts of apportionment were enacted in 1871, 1881, 1891 and in 1901. No enumeration of voters was made in preparation for the passage of the apportionment act of 1901. According to the best evidence available, the United States census taken in 1900, pursuant to the act of Congress of March 3, 1899, 30 Stat. 1014, section 201, that apportionment provided by the act of 1901 did not fairly and equally apportion representatives and senators among the several counties and districts, discriminating against the counties in which appellants reside and favoring other counties with representation in the General Assembly to which their population would not entitle them. In the 55 years passing since enactment of said act of 1901, the various General Assemblies of the State of Tennessee have failed and refused to make other and further enumerations and to apportion the representatives and senators in the General Assembly among the counties and districts according to the qualified voters in each, defeating every act looking to reapportionment of the Legislature.

The apportionment act of 1901 continues to be enforced against appellants and other citizens of Tennessee.

[fol. 65] When enacted, said apportionment act of 1901 required that a majority of the members of the Legislature be elected by less than a majority of the qualified voters of Tennessee. In the 55 years that have passed, continuing trends in population growth and shifts have so magnified the original inequality of representation that said apportionment act now requires that a majority of the members of the Legislature be elected by the majority had in elections at which less than one-third (⅓) of the qualified voters of Tennessee may vote. Does enforcement of said apportionment act deny appellants equal protection of the laws and Constitution of Tennessee, in violation of the Constitution of the United States, Amendment Fourteen, section 1?

Statement of the Case

Appellants sued the election commissioners conducting elections in appellants' counties of residence and, relief by way of declaratory judgment being asked, as required by the laws of Tennessee, made appellee, Attorney General of Tennessee, a party defendant, alleging the invalidity of Chapter 122 of the Acts of the General Assembly of 1901 (codified as Sections 3-101–3-107, Tennessee Code Annotated). In their original bill appellants pleaded the provisions of the Constitution of Tennessee requiring that elections be free and equal, that qualified voters of the state are entitled to vote for members of the General Assembly, and requiring enumeration of the qualified voters every ten years and an apportionment of the number of representatives and senators among the several counties or districts of Tennessee according to the number of qualified voters in each. Appellants pleaded the terms and pro-
[fol. 66] visions of Chapter 122 of the Acts of the General Assembly of 1901, apportioning the number of representatives and senators among the counties and districts, and the invalidity of said act of apportionment for lack of an enumeration of qualified voters and for apportionment of representatives and senators on some basis other than according to the qualified voters residing in the several counties and districts. In their original bill and the exhibits thereto, appellants alleged and demonstrated the inequality of representation provided in said act when originally enacted and as presently applied to the counties and districts of Tennessee. As shown in appellants' bill and exhibits, said act of apportionment did not admit of election of a majority of the members of the General Assembly by a majority of the qualified voters of Tennessee and, instead, required election of a majority of the members of the General Assembly by a minority of the qualified voters of Tennessee. Appellants' bill alleged the debasement of appellants' vote by virtue of the relative overpopulation of their respective districts and alleged the senatorial districts as fixed by said act of 1901 to have grossly unequal voting populations, said districts varying in population between 131,971 in the Eighth Senatorial District and 25,190 in the Thirteenth Senatorial District, as shown

by the United States census. Appellants alleged and their exhibits reflected the additional representation in the General Assembly of Tennessee to which their voting population would entitle them, and they pleaded the invalidity of said act of apportionment for its violation of the terms and provisions of the Constitution of Tennessee.

[fol. 67] Appellants, in section I of their original bill, alleged "that they are now denied the right to equal suffrage in free and equal elections, which right is granted them by the Constitution of the State of Tennessee, and the equal protection of the laws, as guaranteed by both the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States." In section VII, subsection 5, of their original bill appellants alleged the apportionment act of 1901 to be unconstitutional because

> "5. These complainants are further denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes."

Some defendants answered, admitting appellants' right to relief; appellee demurred to the bill. From a decree overruling the demurrer and declaring the act attacked to be unconstitutional and no longer in force and effect by reason of the passage of time, appellee appealed to the Supreme Court of Tennessee.

In brief and argument before the Supreme Court of Tennessee appellants urged the unconstitutionality of said Chapter 122 of the Acts of 1901, General Assembly of Tennessee, for its violation of the provisions of the Constitution of Tennessee and for its denial to appellants of equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 68] In setting forth the insistences made by appellants, the Supreme Court of Tennessee summarized as follows:

> ". . . By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended,

to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elections for mem- [fol. 69] bers of the General Assembly according to said Act unless they are restrained by the court. * * *"

Ruling on the questions presented, the Supreme Court of Tennessee admitted the invalidity of but refused to enter a decree holding said Act unconstitutional, saying:

"... Under the allegations of the bill this Act was invalid at the time it was enacted, but the bill fails to allege the existence of a prior valid apportionment act to fall back upon. In that situation the authorities are practically unanimous in holding that a court will not declare such a statute invalid. In Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37, 32 L.R.A. 578, the Court said that the effect of striking down an apportionment statute under those circumstances would be to destroy the State Government. See also State ex rel. Winnie v. Stoddard, 25 Nev. 452, 62 P. 237, 51 L.R.A. 229.

In State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 95 P. 698, at page 708, a number of cases are cited for the proposition that the court will not declare an apportionment act invalid unless there is a prior valid act on which they may fall back.

"We are therefore of the opinion that the Chancellor was in error in overruling the tenth ground of the Attorney General's demurrer. His decree is accordingly reversed, and the bill is dismissed at the cost of complainants."

[fol. 70] In overruling and reversing the Chancellor and holding that the act complained of is immune from attack since practical difficulties might be encountered if they should hold other than that the act is valid, the Supreme Court of Tennessee made a ruling of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

The Federal Question is Substantial

The discrimination between qualified voters of Tennessee made by said act of apportionment is without parallel in the United States. In the 38 states in which state supreme courts have been called upon to examine acts of apportionment, variations in voting populations of counties and districts were often but ten to twenty percent. Under said act of 1901 and its amendments, the qualified voter of Moore County, Tennessee, has 18 times as much representation in the House of Representatives of the Tennessee Legislature as does the qualified voter of Davidson County, Tennessee. The Constitution of the United States guarantees a republican form of government to the people of every state and the Constitution of Tennessee would not have been approved by the Congress of the United States if it had undertaken to negate the principle of majority rule, the foundation of republican systems of government.

Appellants' bill abundantly shows the invidious and purposeful discrimination prevailing in Tennessee; equal protection of the laws involves a reasonably equal share in the process of making laws. The ruling of the Supreme Court of Tennessee is that equal protection of the law may

be denied if the statute denying equal protection of the [fol. 71] laws would affect the law making body. Thus, that Court's ruling provides a vehicle whereby the Constitutional guarantee of a republican system of government may be circumvented and whereby an invidious and purposeful discrimination may be had between citizens of the same state.

> ". . . Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that discrimination relates to political rights," *Snowden* v. *Hughes*, 321 U.S. 1, 11.

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution, because:

1. A decree of unconstitutionality is not to be entered or withheld according to the balance of conveniences. The Constitution is to be itself applied equally, without fear or favor, according to the guarantees contained in it and not according to whether practical difficulties may attend its enforcement.

2. The Fourteenth Amendment to the Constitution of the United States and the equal protection clause contained in it addresses itself to every branch of state government, legislative, executive and judicial. The ruling of the Supreme Court of Tennessee specifies invidious and purposeful discrimination, but reverses and overrules a Chancellor granting relief and refuses entry of a decree of unconstitutionality, inasmuch as the legislative branch of the government of Tennessee is involved.

[fol. 72] 3. The effect of the ruling and holding of the Supreme Court of Tennessee is that the Constitutions of Tennessee and of the United States do not secure the purity of elections or the principle of majority rule to the qualified voters of a state. The ruling permits unequal elections and upholds a statute requiring rule of a minority.

4. The Act attacked constitutes a present invasion of rights guaranteed appellants by the Constitution of Tennessee and of the United States. Neither Constitution would

require of appellants a showing that a prior act of apportionment [the newest is 66 years old] would serve to give to appellants a reasonably equal share in the law making process and thus equal protection of the laws, now and in this time. To require this showing would be to require appellants to condone and compliment the purposeful, biased inaction through which minority rule is perpetuated in Tennessee.

> "The result by non-action has been a purposeful and systematic plan to discriminate against a geographic class of persons. It has been achieved as though a positive statute had been passed to accomplish the same purpose.
>
> "Biased inaction has had the same result as biased action. It is a denial of equal protection of the law."
>
> *Dyer* v. *Kazuhisa Abe*, D. C. Hawaii, 138 F. Supp. 220.

[fol. 73] Conclusion

For the foregoing matters, it is believed that this Honorable Court may take jurisdiction of appellants' cause and correct the errors in same.

Respectfully submitted,

Z. T. Osborn, Jr., for Barksdale, Hudgins and Osborn, 1316 Nashville Trust Building, Nashville 3, Tennessee.

Hobart Atkins, 410 Cumberland Ave., S.W., Knoxville, Tenn.

[fol. 74]

IN THE SUPREME COURT OF THE UNITED STATES

No. 36651

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

GATES KIDD, ET AL., Appellants,

vs.

GEORGE F. McCANLESS, Appellee.

APPENDIX

[fol. 75]

IN THE SUPREME COURT OF THE UNITED STATES

No. 36651

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

GATES KIDD, ET AL., Appellants,

vs.

GEORGE F. McCANLESS, Appellee.

REHEARING DENIED

GATES KIDD, ET AL.,

vs.

GEORGE F. McCANLESS, Attorney General of the State of Tennessee, et al.

SUPREME COURT OF TENNESSEE

April 5, 1956

Rehearing Denied June 8, 1956

Knox Bigham, James M. Glasgow and Jack Wilson, Asst. Attys. Gen., for appellants.

Haynes Miller and Mayne Miller, and Kent Herrin, Johnson City, Peter Hampton, Elizabethton, Hobart F. Atkins, Knoxville, Maclin P. Davis, Jr., and Barksdale, Hudgins & Osborn, Nashville, for appellees.

SWEPSTON, Justice.

[fol. 76] This is an appeal by the Attorney General from a decree overruling certain grounds of appellants' demurrer to the original bill, and declaring that the legislation providing for the apportionment of Senators and Representatives in the General Assembly, the same being Chapter

122 of the Public Acts of 1901, as amended, now codified as Sections 3-101 et seq. of Tennessee Code Annotated, has expired and is no longer effective.

The ultimate question involved is obviously of great public importance, and we have given the same the study to which the question is entitled. Examination of the Chancellor's opinion discloses that he likewise gave the matter serious and extended study and consideration.

In the view that we take of the matter, however, it will not be necessary to state at length and in detail the various pleadings filed by the numerous parties involved in the litigation, nor will it be necessary to discuss the numerous questions of law raised by the demurrers and passed upon by the Chancellor.

The suit was filed on March 8, 1955, by Gates Kidd and four other voters and residents of Washington County, Tennessee, along with six voters and residents of Carter County, and two voters and residents of Davidson County, against the Attorney General of Tennessee, the Secretary of State, the members of the State Board of Elections, the members of the Republican State Primary Election Commission, the members of the Democratic State Primary Election Commission, the members of the Washington County Election Commission, the Carter County Election [fol. 77] Commission, and the Davidson County Election Commission. By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their

respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elections for members of the General Assembly according to said Act unless they are restrained by the court.

The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the alternative [fol. 78] the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with the decree mathematically reapportioning the State.

There was an answer and cross-bill filed by the Republican State Primary Election Commission and others seeking virtually the same relief as prayed for in the original bill.

The cross-bill was dismissed on demurrer of some of the defendants and on motion as to others.

The Attorney General filed a demurrer setting out 14 grounds, some of which the court sustained, and some of which were overruled.

The Chancellor correctly denied the relief prayed for under the alternative prayers (a) and (b), supra. There is no provision of law for election of our General Assembly by an election at large over the State. The citation of

Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795, is not in point, because the case dealt with the election of [fol. 79] members of the National House of Representatives which is controlled by Article I, Section 2, under which an election at large is permitted in the absence of a redistricting act.

Quite clearly, also, the Governor has no power to reapportion the State for election of our General Assembly.

The Chancellor entertained the bill, however, for the purpose of rendering a declaratory judgment and thereby overruled the tenth and fourteenth grounds of the Attorney General's demurrer which are respectively that the court will not declare a statute unconstitutional if the result will be to disrupt the orderly processes of government, and that the present legislation providing for the apportionment of the Senators and Representatives in the General Assembly is not unconstitutional for any of the reasons stated in the bill.

In his opinion the Chancellor said:

> "The Attorney-General has contended in the 10th ground of demurrer that the Court ought not to declare the law in question invalid or unconstitutional because chaos and confusion would result. But how is this so?
>
> "This Court is entitled to presume and will presume that when it has exercised its constitutional duty in this proceeding to declare that there is no authority for the holding of an election for the members of the General Assembly in 1956, that the other two coordinate branches of our government will likewise exercise their [fol. 80] duty under the Constitution to provide orderly government for the people within their power to do so; that the Governor, therefore, will exercise his constitutional power and duty to call the Legislature into special session for the purpose of making an enumeration and reapportionment as required by the Constitution; that the Legislature, in turn, its power and duty having been declared herein, will exercise and perform the same by making a proper enumeration and apportionment. That the present General As-

sembly may thus act as a *de facto* body, the Court entertains not the slightest doubt. See State v. Cunningham, supra [81 Wis. 440, 51 N.W. 724, 15 L.R.A. 561], wherein the Court pointed out that the last legislature selected under the invalid act might lawfully be reassembled to pass a valid act of apportionment. The *de facto* doctrine is well established in Tennessee, particularly in matters involving public policy and necessity. Beaver v. Hall, 142 Tenn. 416, 433, 217 S.W. 649.

"That such result will not occur, is inconceivable to this Court.

"For these reasons, the Court is of the opinion that the injunctive relief prayed in the bill to restrain the defendants from holding or conducting an election for members of the General Assembly in 1956, or subsequently, is prematurely sought and will be denied. See Maryland Theatrical Corp., v. Brennan, 180 Md. 377, 24 A.2d 911."

[fol. 81] [1] Thus it is apparent that the Chancellor correctly recognized, as he had already done theretofore in the opinion, that the courts have no power to compel either the legislative or the executive department to perform the duties committed exclusively to their respective domains by the fundamental law. He simply made a declaration that we have no valid reapportionment statute and then fell back on the *de facto* doctrine in order to avoid the otherwise necessary conclusion that by reason of the invalidity of the Act of 1901 we would no longer have any lawfully elected members of the General Assembly.

[2] Pretermitting all other questions discussed by the Chancellor and especially the question of whether he had jurisdiction under the declaratory judgment statute, we think the Chancellor was in error in applying the *de facto* doctrine. In the first place the case of Beaver v. Hall, cited by the Chancellor, in which the *de facto* doctrine is dealt with, the syllabus and the authorities discussed in the opinion show that there can be a *de facto* body or office only until there has been a judicial determination of the invalidity of same.

[3] In Ridout v. State, 161 Tenn. 248, at page 270, 30 S.W.2d 255, 71 A.L.R. 830, there are set out those instances where the doctrine is not applied. One instance is where either the person or body is not acting in good faith and the public knows of the want of authority there can be no *de facto* doctrine. 43 Am.Jur. 241, Section 495, in which it is said the general rule is that the acts of a *de facto* officer are valid as to third persons and as to the public only until his title to the office is adjudged insufficient, etc. Id., 244, Section 496.

[fol. 82] Secondly, State v. Cunningham, relied on by the Chancellor, is to be found in 81 Wis. 440, 51 N.W. 724, 15 L.R.A. 561. That case applied the *de facto* doctrine exactly as the Chancellor has applied it here. However, in a much later case, State ex rel. Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610, that doctrine was rejected in the following language, at page 612 of the N.W. Reporter:

> "The reasons advanced in the argument made by the learned attorney general are inconclusive and if followed to their logical conclusion, would bring the government of the state into a legal cul-de-sac because of the elimination for the time being at least, of one of the equal co-ordinate branches of our government. It would destroy our constitutional equilibrium. As suggested, if ch. 27, Special Session, 1931 had become void and legislators elected since 1941 were not chosen from legal and constitutional legislative districts, then would we have a qualified and lawful body to enact a valid reapportionment statute? It is unnecessary, because of the validity of ch. 27, to rely on a theory that legislators elected to office from unconstitutional or non-existent districts, have by some doctrine of de facto officialdom based on de facto legislative districts, a right to exercise the important duties necessarily entering into a fair and just apportionment. Once it is determined that the present incumbents are not de jure officers, they have no color of authority and could not serve as de facto officers. 46 C.J. § 367, p. 1054; Ekern v. McGovern, 1913, 154 Wis. 157, 142 N.W. 595, 46 L.R.A.N.S., 796."

[fol. 83] [4] It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the *de facto* doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly.

It seems hardly necessary to comment on the fact that the Constitution limits the number of Representatives to 99 and the number of Senators to 33, to be apportioned by the Legislature according to the number of voters in the various Districts throughout the State.

The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the manner of electing a new one and ultimately bring about the destruction of the State itself.

Under the allegations of the bill this Act was invalid at the time it was enacted, but the bill fails to allege the existence of a prior valid apportionment act to fall back upon. In that situation the authorities are practically unanimous in holding that a court will not declare such a statute invalid. In Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37, 32 L.R.A. 578, the Court said that the effect of striking down an apportionment statute under those circumstances would be to destroy the State Government. See also State ex rel. [fol. 84] Winnie v. Stoddard, 25 Nev. 452, 62 P. 237, 51 L.R.A. 229. In State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 95 P. 698, at page 708, a number of cases are cited for the proposition that the court will not declare an apportionment act invalid unless there is a prior valid act on which they may fall back.

We are therefore of the opinion that the Chancellor was in error in overruling the tenth ground of the Attorney General's demurrer. His decree is accordingly reversed, and the bill is dismissed at the cost of complainants.

[fol. 85] OPINION ON PETITION TO REHEAR

(Filed June 8, 1956)

DAVID S. LANSDEN, Clerk,
Supreme Court of Tennessee

GATES KIDD, et al.,

—v.—

GEORGE F. McCANLESS,
Attorney General of the
State of Tennessee, et al.

DAVIDSON EQUITY

Hon. Thomas Wardlaw
Steele, Chancellor

For the Appellees:

Hayes Miller & Mayne Miller
Johnson City, Tennessee;

Kent Herrin
Johnson City, Tennessee;

Peter Hampton
Elizabethton, Tennessee;

Hobart Atkins
Knoxville, Tennessee;

Maclin P. Davis
Nashville, Tennessee;

Barksdale, Hudgins &
Osborn
Nashville, Tennessee.

For the Appellants:

Knox Bigham
James M. Glasgow
Jack Wilson
Assistant Attorneys
General
Supreme Court Building
Nashville 3, Tennessee.

Gates Kidd and others have filed their petition to rehear. The gist of same is that they assert it was unnecessary for the Chancellor to rely upon the defacto doctrine because it is alleged that the Legislature owes its exis-[fol. 86] tence to the Constitution and secondly, that the original bill did not challenge the right of any person presently a member of the General Assembly to continue to serve as a member of that body, leaving the inference to be

drawn that the Court in its original opinion decided questions not raised by the pleadings.

It should be perfectly obvious to any lawyer that, while the Legislature exists as a department of government by virtue of the Constitution, yet the members individually hold office by virtue of election held pursuant to law, especially apportionment statutes. Hence, as we held in the original opinion, if the last reapportionment act be held invalid, then the present members of the General Assembly have not been dejure officers but only defacto and under well established authority could no longer be even defacto officers after a judicial decision declaring the statute invalid.

It is also well understood among the legal fraternity that courts do not and should not indulge in the mental exercise of deciding non-determinative points but should decide only such matter or matters as are determinative of the lawsuit. The 10th ground of the demurrer raised a question which the Court considered to be determinative of the whole controversy and we accordingly confine the decision to that one point. It comes as no surprise that petitioners do not agree with the opinion of the Court but that alone is not a sufficient reason for granting a rehearing. With due deference to counsel we must therefore overrule the petition to rehear.

/s/ John E. Swepston
John E. Swepston, J.

[fol. 87] The Statute Attacked

3-101. *Composition—Counties electing one representative each.*—The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Clairborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery,

Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Sumner, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E.S.) ch. 5, Section 1; 1881 (E.S.) ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Sham., Sec. 123; Acts 1919, ch. 147, Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

[fol. 88] 3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901, ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch. 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives (Acts 1901, ch. 122, section 6; Shan., section 126al; Code 1932, section 144.)

3-106. *Joint representatives.*—The following counties jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.

Second district—Sullivan and Hawkins.

Third district—Washington, Greene and Unicoi.

Fourth district—Jefferson and Hamblen.

Fifth district—Hancock and Grainger.

Sixth district—Scott, Campbell, and Union.

Seventh district—Anderson and Morgan.

Eighth district—Knox and Loudon.

Ninth district—Polk and Bradley.

Tenth district—Meigs and Rhea.

[fol. 89] Eleventh district—Cumberland, Bledsoe, Sequatchie, Van Buren and Grundy.

Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.

Fourteenth district—Sumner, Trousdale and Macon.

Fifteenth district—Davidson and Wilson.

Seventeenth district—Giles, Lewis, Maury and Wayne.

Eighteenth district—Williamson, Cheatham and Robertson.

Nineteenth district—Montgomery and Houston.

Twentieth district—Humphreys and Perry.

Twenty-first district—Benton and Decatur.

Twenty-second district—Henry, Weakley and Carroll.

Twenty-third district—Madison and Henderson.

Twenty-sixth district—Tipton and Lauderdale.

Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

[fol. 90] 3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.

Second district—Sullivan and Hawkins.

Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.

Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.

Fifth district—Knox.

Sixth district—Knox, Loudon, Anderson, and Roane.

Seventh district—McMinn, Bradley, Monroe, and Polk.

Eighth district—Hamilton.

Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.

Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.

Eleventh district—Marion, Franklin, Grundy and Warren.

Twelfth district—Rutherford, Cannon, and DeKalb.

Thirteenth district—Wilson and Smith.

Fourteenth district—Sumner, Trousdale and Macon.

Fifteenth district—Montgomery and Robertson.

[fol. 91] Sixteenth district—Davidson.

Seventeenth district—Davidson.

Eighteenth district—Bedford, Coffee, and Moore.

Nineteenth district—Lincoln and Marshall.

Twentieth district—Maury, Perry and Lewis.

Twenty-first district—Hickman, Williamson and Cheatham.

Twenty-second district—Giles, Lawrence and Wayne.

Twenty-third district—Dickson, Humphreys, Houston and Stewart.

Twenty-fourth district—Henry and Carroll.

Twenty-fifth district—Madison, Henderson and Chester.

Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.

Twenty-seventh district—Gibson.

Twenty-eighth district—Lake, Obion and Weakley.

Twenty-ninth district—Dyer, Lauderdale and Crockett.

Thirtieth district—Tipton and Shelby.

Thirty-first district—Haywood and Fayette.

Thirty-second district—Shelby.

Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

[fol. 92] Proof of Service (omitted in printing).

[fol. 97]

ATTACHMENT TO AFFIDAVIT OF JAMES M. GLASGOW

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 469

In the Supreme Court of Tennessee

No. 36,651

GATES KIDD et al., Complainants-Appellants,

vs.

GEORGE F. MCCANLESS, Attorney General,
Defendant-Appellee.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS

The appellee, George F. McCanless, Attorney General of Tennessee, for his statement in opposition to the appellants' statement of jurisdiction, and in support of his motion to dismiss, respectfully shows the following:

I.

Statement of Issues on Appeal

This suit was commenced in the Chancery Court for Davidson County, Tennessee, by Gates Kidd and four other voters and residents of Washington County, six voters and residents of Carter County, and two voters and [fol. 98] residents of Davidson County against the Attorney General, the Secretary of State, the members of the Republican and Democratic State Primary Election Commissions, and the members of the Washington, Carter and Davidson County Election Commissions, challenging the validity of the laws enacted in 1901 which apportioned the State for seats in the General Assembly of Tennessee, a bicameral body. The Supreme Court of Tennessee reversed the holding of the Chancellor who declared that the apportionment statutes had expired with the passage of time, and held it would not declare the statute unconstitutional since the result would be to disrupt the orderly processes of government.

The bill is lengthy but its allegations were accurately summarized by the Supreme Court of Tennessee as follows:

> "... By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) No census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and

vote in their respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of [fol. 99] approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elections for members of the General Assembly according to said Act unless they are restrained by the court.

"The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the alternative the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with the decree mathematically reapportioning the State" (Appellants' Statement, pp. 3a-4a).*

The Republican State Primary Election Commission filed an answer and a cross bill. By the latter, the Governor and the members of the General Assembly of 1955 were made parties. The cross bill prayed that the Court require them to reapportion the State. On motion and demurrer the Chancellor dismissed the cross bill.

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* This is a reference to the Appellants' Jurisdictional Statement which contains the opinion of the Supreme Court of Tennessee.

[fol. 100] The Attorney General demurred to the original bill upon the theory that a political or legislative question was presented. The jurisdiction of the Court was assailed for various reasons and the power of the Court to declare the rights of the parties, to grant any relief, to enter a decree reapportioning the State, or to hold or conduct an election to elect members of the General Assembly, was challenged. In substance and effect, the demurrers asserted the constitutionality of the apportionment laws because (1) the complainants are guilty of laches, since they waited 54 years to challenge them; (2) the orderly processes of government would be disrupted, since Tennessee would be without a General Assembly if the bill should be maintained; and (3) the bill did not state any reason for declaring the statutes unconstitutional.

The Chancellor sustained the bill, overruling those grounds of the demurrer defending the constitutionality of the statutes. The Attorney General prayed and was granted an appeal to the Supreme Court of Tennessee. The latter, pretermitting the issue of justiciability, held that the Chancellor erroneously overruled the tenth ground of the Attorney General's demurrer; i.e., the courts will not declare a statute unconstitutional if the result will be to disrupt the orderly processes of government. Therefore, the matter stands upon the technical record and without proof as to the merits.

By the attempt to appeal to this Court, the only question raised is whether the appellants have been denied equal protection of the laws within the meaning of the fourteenth amendment to the Constitution of the United States. They theorize that due to the increase and shifts in population, an elector's ballot is given more weight in some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. In other words, they contend that some assembly districts are over-represented [fol. 101] while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts. Relying upon the Federal population census of 1950, the appellants have alleged inequalities of representation although the State Constitu-

tion requires "an enumeration of qualified voters." Art. II, Sec. 4, Constitution of Tennessee, Appendix B. Nevertheless, the appellants insist that a majority of the General Assembly represents less than a majority of the qualified voters. This, they say, is undemocratic and denies them a republican form of government. They contend that the concept of "majority rule" is so ingrained into our constitutional system that they are denied equal protection under the laws as guaranteed by the Federal Constitution.

Also, the appellants argue that since a minority of the qualified voters elect a majority of the Assembly that their right of franchise is debased so that they are denied the right of equal suffrage in free and equal elections. They now attempt to invoke the jurisdiction of this Court, although the question presented is purely political and legislative.

Significantly, the bill fails to allege, and we do not understand that the appellants insist, that there is a prior valid apportionment law upon which to fall back if the present apportionment laws should be declared unconstitutional. There is no charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Art. IV, Sec. 1, Appendix B. A lack of purity of the ballot box is not charged. There is no suggestion that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the General Assembly are elected by less than a majority of the votes cast in the respective Assembly districts. Therefore, as we understand the law, the ap- [fol. 102] pellants are exercising every right of franchise to which they are entitled under the Constitution. Notwithstanding these, the appellants insist that they are the subjects of invidious discrimination at the ballot box.

II.

The Opinion of the State Court Rests Upon an Adequate and Independent Non-Federal Ground

In holding that to declare the apportionment laws unconstitutional would disrupt the orderly processes of gov-

ernment, the Supreme Court of Tennessee squarely based its opinion upon the broadest possible state ground. The Court logically and inescapably concluded:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present legislature and the means of electing a new one and ultimately bring about the destruction of the state itself" (Appellants' Statement, p. 9a).

The Court reasoned that once it was determined that the members of the General Assembly are not de jure officers, they have no authority to act as de facto officers after a judicial determination of their status. *Heard* v. *Elliot*, 116 Tenn. 150, 92 S. W. 764; *Beaver* v. *Hall*, 142 Tenn. 416, 217 S. W. 649; *Rideout* v. *State*, 161 Tenn. 248, 30 S. W. 2d 255, 71 A. L. R. 830. The Court pointed out that where the person or body is not acting in good faith and the public knows of the want of authority, there can be no de facto doctrine. Thus, it follows that this attempted appeal should be dismissed because the state decision rests upon an adequate and independent non-federal ground, and this Court is without jurisdiction. *Black* v. *Cutter Laboratories* (Cal., 1956), 76 S. Ct. 824; *Herb* v. *Pitcairn* [fol. 103] (Ill., 1945), 65 S. Ct. 459, 324 U. S. 117, 89 L. Ed. 789; *Enterprise Irrigating District* v. *Farmers Mutual Canal Co.* (Neb., 1917), 37 S. Ct. 318, 243 U. S. 157, 61 L. Ed. 644.

Further, it is immaterial whether the decision of the State Court is right or wrong since there is no assertion that the State Court adopted its view of the non-federal question in order to evade a federal constitutional issue, and the state decision has no relation to any federal question raised in the state courts. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co., supra.* There it is also said that this Court is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the non-federal ground is unfounded. In *McCoy* v. *Shaw* (Okla., 1928), 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891, this Court declared:

> "It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved, and broad enough to sustain the judgment, *cannot be reviewed by this Court*, unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." (Emphasis supplied.)

Although we think that the foregoing is sufficient to warrant the dismissal of the attempted appeal, we invoke another rule of law to sustain the position of the appellee.

The rule has long been recognized that the state courts have absolute power and authority to adjudicate the common law of the state and to construe the state statutes and Constitution. However, we quote from the unequivocating language of Mr. Justice Cardozo, who wrote:

> [fol. 104] "A judgment by the highest Court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

Highland Farms Dairy, Inc. v. *Agnew* (Va., 1937), 57 S. Ct. 549, 300 U. S. 608.

The application of the rule to the case at bar is obvious. The Supreme Court of Tennessee has decided that if the apportionment laws are held unconstitutional the State itself will be destroyed. This would necessarily result if the General Assembly is declared to be non-existent. Thereby, the basic framework of constitutional government in Tennessee would be destroyed. Instead of having three departments of government, the State would be reduced to two. Consequently, a democratic form of constitutional government as guaranteed by Art. IV, Sec. 4, Constitution of the United States, would end by a decision of this Court. Where such a result may be contemplated, it is inconceivable that the appellants would pursue the matter to the extent of asking this Court to destroy the government of the State. What more serious question involving a state constitution could there be?

The argument of the appellants that they are denied a republican form of government because a minority of the qualified voters may elect a majority of the members of the General Assembly is specious. It is generally known that candidates for public office are frequently elected by less than a majority of the votes cast in an election where there are many candidates, or in situations where less than a majority of the electorate votes in an election.

Speculation always arises in a presidential election year that one of the candidates may receive a majority of the popular vote but less than a majority in the electoral college.

A similar situation prevails in Georgia under the county unit voting plan and this Court has refused to disturb the system, as will be discussed later in this statement.

[fol. 105] In any event, the appellants cannot raise the question of a republican form of government in this proceeding because the subject is beyond the scope of judicial power. *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District* (Ohio, 1930), 50 S. Ct. 228, 281 U. S. 74, 74 L. Ed. 710, 66 A. L. R. 1460.

III.

No Substantial Federal Question Is Raised by the Attempted Appeal

No substantial federal question is presented by the appellants, who claim that their votes do not have as much weight as the votes of those who live in assembly districts having fewer qualified voters than in the districts in which the appellants reside. The gravamen of their complaint is that they do not have the opportunity to vote for as many members of the General Assembly as they think they should instead of the relative value of their voting rights. Thereby, a larger number of senators and representatives, representing the appellants' districts, would give them greater representation and more votes in the General Assembly. This is the real issue.

These are not the same rights which come within the purview of the equal protection clause of the fourteenth amendment. They are not the same political rights to

which the cases refer when invidious and purposeful discrimination is condemned. Neither are they the rights of the character protected in the cases upon which the appellants rely in support of their position.

Snowden v. *Hughes* (Ill., 1944), 64 S. Ct. 397, 321 U. S. 1; *McPherson* v. *Blacker* (Mich., 1892), 13 S. Ct. 3, 146 U. S. 1, 36 L. Ed. 869; *Nixon* v. *Herndon* (Tex., 1926), 47 S. Ct. 446, 273 U. S. 536, 71 L. Ed. 759; *Nixon* v. *Condon* (Tex., 1932), 52 S. Ct. 484, 286 U. S. 73, 76 L. Ed. 984, 88 A. L. R. 458, are cited. The Snowden and Nixon cases were brought by [fol. 106] individuals to obtain damages for the infringement of civil rights.

In McPherson, this Court refused to apply the equal protection clause to a Michigan statute which provided for the election of presidential electors by congressional districts instead of the state at large. In discussing the object of the fourteenth amendment and voting rights, the Court emphasizes:

> "The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not radically change the whole theory of the state and federal governments to each other, and both governments to the people" (146 U. S. 39).
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> • • • • • • •
>
> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made" (146 U. S. 40).

There is no discrimination as to any elector's right of franchise in Tennessee within the doctrine of the McPherson case.

The case of *Thomas* v. *Reid* (1930), 142 Okla. 38, 285 Pac. 92, is of importance only in its holding that a statute requiring approval of 60% of the voters for the sale of a municipal power plant violates the Constitution of Oklahoma. Likewise, the case of *Maynard* v. *Board of Canvassers* (1890), 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 32,

is authority only for the proposition that cumulative voting is impliedly prohibited by the Michigan Constitution. Neither case supports the appellants' position in this Court nor may be considered an authority holding that this Court has jurisdiction in this instance.

[fol. 107] In *Cook* v. *State* (1891), 90 Tenn. 407, 116 S. W. 471, the Court upheld the constitutionality of a statute making it a criminal offense to remove ballots, to assist electors in marking their ballots, or to instruct them how to vote.

Construing the Organic Act of Hawaii, 48 U. S. C. A., Sec. 491, which requires reapportionment from "time to time" in *Dyer* v. *Abe* (1956), 138 F. Supp. 220, the Federal District Court held that the plaintiff, a voter, had been denied equal protection of the laws due to the failure of the territorial legislature to reapportion the territory. Painstakingly, the Court emphasizes the difference between a "federal-territorial" relationship and a "federal-state" relationship, and, upon this distinction, differentiates the case from *Colgrove* v. *Green* (1946), 66 S. Ct. 1198, 326 U. S. 459, 90 L. Ed. 1432, where reapportionment was held to be a political question.

In the eight cases cited there is not one which holds that this Court has jurisdiction in a case similar to the one at bar. None of the cases holds that the reapportionment of a state presents a federal question and none supports the jurisdiction of this Court.

In the absence of a substantial federal question, this Court will dismiss an attempted appeal for lack of jurisdiction. *Hulbert* v. *Chicago* (Ill., 1906), 26 S. Ct. 617, 201 U. S. 275; *Zucht* v. *King* (Tex., 1922), 43 S. Ct. 24, 260 U. S. 174.

IV.

Reapportionment Is a Political Question

The appellee reiterates the contention that the character of the political question presented here is not the same as in those cases where relief is granted for a private wrong. [fol. 108] The problem presented in this case affects the people of Tennessee as a body politic and sovereign. This is not a damage suit as were the Snowden and Nixon cases. This distinction was recognized in *Colgrove* v. *Green* where

the Court stated that the basis of the suit is " . . . a wrong suffered by Illinois as a polity."

The Colgrove decision clearly supports the appellee's position in this case, and the question of reapportioning congressional districts is patently stronger than one involving the reapportionment of the general assembly of a state.

Subsequently, the Court decided *MacDougall* v. *Green* (1948), 69 S. Ct. 1, 335 U. S. 281, where this Court held in a per curiam opinion that an Illinois statute requiring a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties does not violate the Fourteenth Amendment.

Again, the principle of these cases was approved and affirmed in *South* v. *Peters* (1950), 70 S. Ct. 641, 339 U. S. 276, 94 L. Ed. 834, where Georgia's county unit system of voting was challenged in the Federal District Court. In affirming the District Court, which dismissed the appellants' petition, this Court in a per curiam opinion asserted,

> " . . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

This pronouncement by this Court did not satisfy those who would assault Georgia's county unit laws. A suit was then filed in the state court making a similar attack. *Cox* v. *Peters* (1951), 208 Ga. 498, 67 S. E. 2d 579. The insistence, among others, in the state court was that the [fol. 109] petitioner's vote had not received its full value in violation of the equal protection clause of the fourteenth amendment. Holding that a party primary is not an election within the statutes and constitution, the Supreme Court of Georgia denied relief in damages for the infringement of his civil rights. Thereupon, the petitioner, Cox, sought to appeal to this Court. The appellee's motion to dismiss was granted and the Court announced " . . . the appeal is dismissed for the want of a substantial federal question." *Cox* v. *Peters* (Ga., 1952), 72 S. Ct. 559, 342 U. S. 936, 96 L. Ed. 697. Also, see, *Turmon* v. *Duckworth* (D. C.

Ga., 1946), 68 F. Supp. 744, appeal dismissed 67 S. Ct. 21, 329 U. S. 675, 91 L. Ed. 596, rehearing denied 67 S. Ct. 296, 329 U. S. 829, 91 L. Ed. 704; *Cook* v. *Fortson* (D. C. Ga., 1946), 68 F. Supp. 624, appeal dismissed 67 S. Ct. 21, 329 U. S. 675, 91 L. Ed. 596, rehearing denied 67 S. Ct. 296, 329 U. S. 839, 91 L. Ed. 703.

The insistence that a vote has no weight when cast in a county in Georgia for a candidate receiving less than a majority is more compelling than the contention made in this case that the voter is denied equal voting strength in the General Assembly. Yet, the equal protection clause affords no relief for the Georgia voter.

Clearly, we think, the decisions of this Court declare the problem of reapportionment to be a political question which should be addressed to the people of Tennessee and their General Assembly. The Constitution of Tennessee belongs to its people. They are capable of determining political and governmental issues arising in connection with their state government. They should be permitted to resolve the question of reapportionment in their own way.

Wherefore, the appellee respectfully moves that the within appeal be dismissed or that the judgment and de- [fol. 110] cree of the Supreme Court of the State of Tennessee be affirmed.

Jack Wilson, James M. Glasgow, Assistant Attorneys General of Tennessee, Attorneys for the Appellee.

Certificate of Service

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the appellee, hereby certifies that on the ..... day of October, 1956, he served the within and foregoing statement in opposition to the appellants' statement of jurisdiction and motion to dismiss on Gates Kidd et al., appellants, by depositing at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing statement securely enclosed in an envelope, postage duly prepaid, addressed to one of the attorneys of

the appellants at his post office address as stated below, that is to say, Honorable Z. T. Osborn, Jr., Barksdale, Hudgins and Osborn, 1316 Nashville Trust Building, Nashville 3, Tennessee.

James M. Glasgow, Assistant Attorney General.

Mailing address: Supreme Court Building, Nashville, Tennessee.

[fol. 111]

APPENDIX A.

Constitution of Tennessee.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any

county having two-thirds of the ratio shall be entitled to one member.

[fol. 112] Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

* * * * * * *

[fol. 113]

Appendix B.

Constitution of Tennessee.

Article IV.

Sec. 1. Right to vote—Election precincts—Military duty.—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this State shall be subject to the performance of military duty, as may be prescribed by law.

[fol. 114] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

[Title omitted]

ORDER PERMITTING AMENDMENT TO COMPLAINT—July 21, 1959

Upon application of the plaintiffs made in open Court at the argument of the Motion to Dismiss made by the defendants, it is

Ordered that plaintiffs be and they are hereby permitted to amend their Complaint heretofore filed in this cause, in accordance with an amendment hereto attached and made a part hereof.

Enter this 21 day of July, 1959.

Wm. E. Miller, Judge.

O.K. for Entry, Hobart Atkins, Walter Chandler, Denney, Leftwich & Osborn, Attorneys for Plaintiffs.

Allison B. Humphreys, Solicitor General for the State of Tennessee.

July 21, 1959

[fol. 115] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

[Title omitted]

AMENDMENT TO COMPLAINT—Filed July 21, 1959

Leave of Court having heretofore been obtained, the plaintiffs amend their Complaint by striking the present

ninth section, or Paragraph IX, of their Complaint and inserting in lieu thereof the following:

[fol. 116] IX

"The last reapportionment of the General Assembly of Tennessee was made by Chapter 122 of the Public Acts of Tennessee of 1901; this chapter now constitutes Sections 3-101 to 3-109 of the Tennessee Code Annotated.

That the Act of 1901 was unconstitutional when drawn in 1901 because:

1. No census of qualified voters upon which a proper apportionment could be based was actually made in spite of the explicit requirement of Section 4 of Article II that such an enumeration of qualified voters be taken and made the basis of each decennial reapportionment.

2. The apportionment of representatives and senators was unfairly and unequally made, as shown by the best evidence of the voting population actually residing in the counties of Tennessee in 1901, the United States Census, which was taken in pursuance of the Act of Congress of March 3, 1899, 30 Stat. 1014, Section 201, Title 13 USCA; i.e., the United States census would show that the number of qualified voters of both Carter County and Anderson County exceeded that of some fifteen counties which were each given separate representation, while both Carter County and Anderson County were denied separate representation; and that Senate Joint Resolution No. 35, adopted February 7, approved February 8, 1901, was not obeyed by the reapportioning committee which drew the Act of 1901 but that the committee recommended and the General Assembly voted an Act which unreasonably discriminated against Anderson and Carter Counties, inter alia.

The Federal census of 1900 contained an enumeration of qualified voters of the counties and districts of Tennessee; [fol. 117] this census demonstrated that Davidson County was entitled to additional representation in the Senate and in the House of Representatives of Tennessee. Despite this, said act of 1901 decreased the representation had by Davidson County in the House of Representatives under the Apportionment Act of 1891. As will be shown at the hear-

ing, said Act of 1901 made no apportionment of Representatives and Senators in accordance with the constitutional formula heretofore set forth, but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference to any enumeration of qualified voters and, indeed, without reference to any logical or reasonable formula whatever. The apportionment made in said act was in no wise the exercise of any discretion allowed the Legislature by the Constitution of Tennessee, nor was it made in the exercise of any right to make a political decision as to the composition of the General Assembly.

There have been five Federal enumerations of the population of the State of Tennessee since 1900, namely, 1910, 1920, 1930, 1940, and 1950. All of the Tennessee Legislatures after each such enumeration have been under a constitutional mandate in accordance with their oaths of office to support the Constitution of the United States and Constitution of the State of Tennessee, described by Article II, Sections 4, 5 and 6 of the Tennessee Constitution, to reapportion said senatorial and representative districts in accordance with the result of the latest available enumeration. Since the Federal Census of 1910, there have been numerous regular and extra sessions of the Tennessee Legislature; however, each and every such Legislature, including the present Legislature up to the time of the [fol. 118] issuance of this complaint, has failed to reapportion and readjust the boundaries of said districts, all in violation of the Constitution of the United States and Constitution of the State of Tennessee.

Denney, Leftwich & Osborn, Nashville, Tennessee; Hobart F. Atkins, Knoxville, Tennessee; Chandler, Manire & Chandler, Memphis, Tennessee.

[fol. 119] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

CHARLES W. BAKER, et al., Plaintiffs,

v.

JOE C. CARR, Secretary of State of Tennessee, et al., Defendants.

MEMORANDUM OPINION ON CONVENING THREE-JUDGE COURT—July 31, 1959

It is urgently and ably insisted by defendants that the federal question sought to be made by the complaint is "obviously without merit" and that the Court under the doctrine of Ex Parte Poresky, 290 U. S. 30, should therefore dismiss the action without taking steps to constitute a court of three judges under 28 U. S. C. A. Section 2281.

Without undertaking a detailed resume of the allegations of the complaint, the short of the matter is that under the Constitution of Tennessee the members of the House of Representatives are limited to 99 in number and the members of the Senate to 33, and the legislature is directed at [fol. 120] the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the number of members of the legislature among the several counties or districts according to the number of qualified voters therein. Tenn. Const. Art. 2, Secs. 4, 5 and 6. However, according to the allegations of the bill, (accepted as true for the purposes of the present motion) these mandatory requirements of the State Constitution have been systematically and continuously violated and ignored by the Legislature of Tennessee. No reapportionment act has been passed since the Act of 1901, and even that act, the amended complaint alleges, was enacted without the enumeration of voters required by the Constitution

of the State. As a result of changes in population the existing legislative apportionment has become progressively discriminatory in character. The failure and refusal of the legislature to abide by plain and unequivocal provisions of the state Constitution have resulted in a debasement of the voting rights of large numbers of citizens as well as in a gross inequality of representation in the legislative councils of the state.

The plaintiffs, suing on their own behalf and on behalf of others similarly situated, reside in geographical areas which have suffered most from the discrimination. They invoke the Constitution of the United States, particularly the equal protection and due process clauses of the Fourteenth Amendment, contending that the legislature of Tennessee in failing to comply with the state Constitution has subjected them to an invidious discrimination that con- [fol. 121] stitutes a denial of the equal protection of the law and a deprivation of due process of law.

The defendants, at this time at least, do not deny the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution. What they do say is that the question involved is exclusively of a political nature and does not present a justiciable controversy, with the result that the Court has no power or jurisdiction to intervene to grant any kind of relief.

The problem of legislative reapportionment has been before the courts on numerous occasions and it would serve no useful purpose to undertake at this time a survey or review of the many decisions on the question. There can be no doubt that generally speaking the courts have been reluctant to enter into an area that might bring them into collision with a coordinate branch of the government. This has resulted in many cases in creating a zone which is "off limits" to judicial authority, leaving a manifest wrong without a judicial remedy. Some courts refuse to intervene upon the ground that the controversy is of a peculiarly political nature, or, as otherwise expressed, is not a justiciable controversy, while the refusal to intervene in other opinions is pitched upon the theory that the courts should exercise their equity discretion to refuse to exercise juris-

diction in a controversy so fraught with political implications.

[fol. 122] After a careful review of the allegations of the complaint in the light of the many authorities cited by counsel for the respective parties, the Court has reached the conclusion that the issues presented are of such character that they should be evaluated and considered by a three-judge court as provided by statute and that this Court should not undertake to dismiss the complaint summarily. Notwithstanding some expressions in the cases which would indicate that there is no hope of judicial relief in a case of this type, the Court is not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration.

Possibly the leading decision of the Supreme Court of the United States upon the general question is Colegrove v. Green, 328 U. S. 549, in which the court sustained the dismissal of an action of qualified voters in certain Illinois Congressional districts to restrain the holding of elections under the provisions of an Illinois law governing such Congressional districts. It may be that the decision in this case closes the door to relief in the present case but the Court is not prepared to say that this conclusion necessarily follows or that it follows so clearly and distinctly that it is not even debatable. In that case seven justices of the Supreme Court heard the appeal. While a majority of four justices held that the action should be dismissed, it is significant that they disagreed as to the reasons for such dis-
[fol. 123] missal, and that three of the justices dissented from the majority and expressed the view that the action should be sustained. Three of the justices in the majority were of the opinion that the question involved was so political in nature that the courts lacked jurisdiction and that the action should be dismissed for that reason. The other majority justice, while agreeing that the action should be dismissed, was of the opinion that the court had jurisdiction but that in the exercise of its discretion as a court of equity, it should decline to exercise such jurisdiction by intervening in a controversy having so many serious problems and complications. The three dissenting justices were

of the opinion not only that the court had jurisdiction but that such jurisdiction should actually be exercised to enjoin the holding of the election under the Illinois Act. It is also worthy of note, as pointed out by Justice Frankfurter in his opinion, that the case could have been disposed of by affirming the dismissal on the authority of the prior decision in Wood v. Broom, 287 U. S. 1, holding that where the Congressional Reapportionment Act did not contain a requirement as to the compactness, contiguity, and equality in population of districts, the state legislature in creating Congressional districts need not observe such requirement.

Whether Colegrove v. Green requires a dismissal of the present action is a question which can be fully considered and determined by a three-judge court. For present pur- [fol. 124] poses it is enough to say that there are differences between that case and the present one that may ultimately prove to be significant. In the first place, Colegrove v. Green involved Congressional districts created by a state legislature under an Act of Congress which contained no requirement that the districts should be set up on the basis of equality or approximate equality of population. Consequently, in failing to redistrict, the legislature of Illinois did not violate any specific provision of its own Constitution or any specific provision of federal law requiring periodic redistricting upon the basis of equality. Further, in the Colegrove case there was ample power vested in Congress under the Federal Constitution to redistrict the state if the existing districts set up by state law had become inequitable. In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.

McDougall v. Green, 335 U. S. 281, another Supreme Court case cited by defendants as requiring dismissal of the present action, was disposed of by the court in a brief per curiam opinion, but as this Court construes the opinion, the questions here presented were not reached. It is apparent that the court was of the opinion and actually held that the

[fol. 125] Illinois law attacked in that case did not constitute a denial of the equal protection of the law and did not deprive the plaintiffs of due process of law. It was stated in the opinion that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality". In short, the court held that there was no violation of federal law established, and consequently it was not necessary for the court to decide whether it had power or jurisdiction to grant relief if the violation of federal law had been made to appear. Three justices dissented from the majority, being of the view that the state law constituted a violation of the equal protection clause of the Fourteenth Amendment and that the court should declare the law void. Mr. Justice Rutledge, as in Colegrove v. Green, concurred in dismissing the action but expressed the opinion that a violation of the Fourteenth Amendment was shown, and that the dismissal should be based upon the discretionary right of a court of equity to refuse to entertain jurisdiction.

In South v. Peters, 339 U. S. 276, the court refused to enjoin adherence in the forthcoming primary to the statute of Georgia prescribing the county unit system. Again in a brief per curiam opinion, the action of the district court in dismissing the action was affirmed, but it is not clear from the opinion whether the refusal to intervene is based upon a lack of jurisdiction or upon the ground that equitable relief should be refused under the particular circumstances of the case. This decision also was by a divided [fol. 126] court, two justices believing that the relief should be granted.

A careful reading of the opinion of the Supreme Court of Tennessee in Kidd v. McCanless, 200 Tenn. 273, involving the same laws of Tennessee as the instant case, reveals that the fundamental basis of the decision was the court's opinion that relief could not be granted without completely disrupting, if not destroying, the government of the state. After finding that the de facto doctrine could not be applied and that if the Reapportionment Act was declared unconstitutional the state would be deprived of a legislature, the court held under such circumstances that a declaration of unconstitutionality should be withheld. Thus, the opinion

would appear to stand for the proposition that the courts should refuse to intervene in the exercise of a proper discretion in given circumstances, and not for the proposition that jurisdiction does not exist or is completely wanting in such cases. The Supreme Court of the United States simply dismissed the appeal (352 U. S. 920) without comment, citing Colegrove v. Green, supra. The fair inference is that the Supreme Court concurred in the finding of the Tennessee Court that equitable relief should be denied in a case where to grant such relief the government of the state would be disrupted or thrown into chaos and confusion.

From this brief review of some of the more frequently cited decisions of the Supreme Court, it would appear to be at least debatable whether that court has foreclosed the [fol. 127] question in all cases of legislative reapportionment. It can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention. If the issues are not conclusively settled against the plaintiffs by prior Supreme Court decisions, as to which the Court presently expresses no opinion, the questions of jurisdiction and the propriety of exercising or withholding it, would have to be decided in the light of all relevant factors, including a consideration of the fundamental principle of separation of powers, the desirability of avoiding conflicts with other branches of the government, the delicacy of the relationship existing between the federal and state governments, the possibility of the disruption of the governmental affairs of the state, the nature of the rights claimed by the plaintiffs, the degree and extent to which these rights have been violated, and the ability or inability of the courts to grant effective relief. If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state

government and at the same time protect and enforce the rights of the individual citizen.

[fol. 128] Believing that the questions presented should be considered by a court of three judges, the Court has, pursuant to 28 U. S. C. A. Section 2284, notified the Chief Judge of the Sixth Circuit of the pendency of the action and the ruling of the Court herein denying the motion to dismiss. This will result in the constitution of a court of three judges under 28 U. S. C. A. Section 2281.

William E. Miller, United States District Judge.

[fol. 129]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ORDER DENYING MOTION TO DISMISS WITHOUT ASSEMBLING A THREE-JUDGE COURT—July 31, 1959

In this action, for the reasons set forth in memorandum filed herein on July 31, 1959, the defendants' motion, filed June 17, 1959, to dismiss the action without assembling a three-judge court upon the ground that the action does not raise a substantial federal question, is denied.

Wm. E. Miller, United States District Judge.

[fol. 130]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nashville Civil No. 2724

DESIGNATION OF THREE-JUDGE COURT—August 10, 1959

Chief Judge Thomas F. McAllister of the Court of Appeals for the Sixth Circuit being absent from the circuit and the geographical boundaries of the United States of America and temporarily unable to perform the duties of

Chief Judge, and whereas I, being the circuit judge of said Court in active service, present in the circuit, able and qualified to act and next in precedence, am authorized and directed to act as Chief Judge under the provisions of Section 45, Title 28, U. S. Code, and whereas in my judgment the public interest so requires;

Now, therefore, pursuant to notification by the United States District Judge for the Middle District of Tennessee and the provisions of Sections 2281 and 2284, Title 28, U. S. Code, I do hereby designate and assign the Honorable John D. Martin, United States Circuit Judge, Court of Appeals for the Sixth Circuit, the Honorable Marion S. Boyd, United States District Judge for the Western District of Tennessee, and the Honorable William E. Miller, United States District Judge for the Middle District of Tennessee, to constitute a Three-Judge Court in the Middle District of Tennessee for the hearing of Civil Action No. 2724, Nashville Division, Charles W. Baker, et al., plaintiffs, v. Joe C. Carr, Secretary of State of Tennessee, et al., therein pending, during the period beginning August 11, 1959, and ending December 31, 1959, and for such further time as may be required to complete unfinished business in connection with the hearing.

Dated: August 10, 1959

Shackelford Miller, Jr., Acting Chief Judge, Sixth Circuit.

[fol. 131] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

[Title omitted]

MOTION OF BEN WEST TO INTERVENE AS A PLAINTIFF—Filed November 17, 1959

Ben West, Mayor of the City of Nashville, Tennessee, acting on behalf of all the residents of the City of Nashville,

Tennessee, as authorized by the City Council of Nashville, Tennessee, moves the Court for an order permitting him to intervene as a plaintiff in this action and to file a complaint in order to assert the claims in such proposed complaint on the grounds that:

1. The representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.

[fol. 132] 2. The applicant's claim and the main action have questions of law and fact in common.

Dated November 17th 1959.

Z. T. Osborn, Jr., Denney, Leftwich & Osborn, Nashville Trust Building, Nashville, Tennessee; Harris A. Gilbert, Barksdale & Hudgins, Nashville Trust Building, Nashville, Tennessee, Attorneys for Ben West, Mayor, Applicant for Intervention.

Robert H. Jennings, City Attorney, City of Nashville, City Hall, Nashville, Tennessee.

[fol. 133] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION OF CITY OF CHATTANOOGA TO INTERVENE—
Filed November 23, 1959

The City of Chattanooga, Tennessee, a municipal corporation under the laws of Tennessee with situs in Hamilton County, Tennessee, moves for leave to intervene in this action in order to assert the rights and claims of its 158,100 citizens and residents under the complaint and other pleadings heretofore filed by Plaintiffs.

1. Intervenor desires to file a complaint as such, adopting the allegations and prayers contained in the original complaint and other pleadings filed by Plaintiffs.

2. The citizens and residents of the City of Chattanooga, Tennessee, are members of the same class of citizens and residents of the State of Tennessee who have been deprived of fair and adequate representation in the General Assembly of the State of Tennessee as the original Plaintiffs herein and may be bound by a judgment in this action.

Wherefore, Applicant, City of Chattanooga, Tennessee moves for leave to intervene as Plaintiff in this action.

E. K. Meacham, Attorney for Applicant, 324 Hamilton National Bank Building, Chattanooga, Tennessee.

Of Counsel: J. W. Anderson, City Attorney, Chattanooga, Tennessee.

[fol. 134] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ORDER ALLOWING CITY OF CHATTANOOGA TO FILE COMPLAINT IN INTERVENTION—November 23, 1959

This cause came on to be heard this November 23, 1959, on the motion of the City of Chattanooga, Tennessee, a Municipal Corporation under the laws of Tennessee, and the Court being fully advised in the matter,

It is Ordered that the City of Chattanooga, Tennessee, a municipal corporation, be, and it hereby is, allowed to enter its appearance in said cause and to file its complaint in intervention therein.

Approved for entry.

John D. Martin, Marion S. Boyd, William E. Miller, U. S. Judges.

[fol. 135] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

COMPLAINT OF CITY OF CHATTANOOGA AS INTERVENOR—
Filed November 23, 1959

The complaint of the City of Chattanooga, Tennessee, filed pursuant to order herein, respectfully represents to this honorable Court:

1. Plaintiff is a municipal corporation under the laws of Tennessee with situs in Hamilton County, Tennessee with a current population of 158,100 citizens. Its citizens and residents are entitled to vote for members of the Legislature of the State of Tennessee. The citizens and residents of Plaintiff are among those citizens of the State of Tennessee now denied the right to equal suffrage in free and equal elections, which right is granted them by the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States by reason of the equal protections of the laws guaranteed to the citizens and residents of Plaintiff and others similarly situated. Plaintiff desires to intervene in this cause for the reason that citizens of the City of Chattanooga, Tennessee are not specifically named as plaintiffs in said cause, although they are entitled to present to this Court the interest of said citizens in the purposes of the Complaint filed herein.

2. Plaintiff, City of Chattanooga, Tennessee, therefore adopts all the material allegations of the Complaint herein, avers that at the present time no fair and just apportionment of the Senatorial Districts comprising the Senate of the General Assembly of Tennessee and no fair and just apportionment of the Direct Representatives comprising [fol. 136] the House in the General Assembly of Tennessee exists in accordance with the Federal Census of 1950. Plain-

tiff therefore desires to present for the consideration of the Court a proposal for proper representation by Senators and Representatives in the Tennessee General Assembly in accordance with the Federal Census of 1950. It is the special purpose of Plaintiff to join with the other Plaintiffs in showing to the Court the gross inequalities being practiced upon the majority of the citizens and qualified voters of the City of Chattanooga, Tennessee and of the State of Tennessee by reason of the present apportionment of the Tennessee Legislature.

Wherefore, Premises Considered, Plaintiff Prays:

1. That it be granted leave of Court to intervene in this cause as a Plaintiff and be granted such rights as it may be entitled to have as a Plaintiff in presenting the cause of citizens and residents of the City of Chattanooga, Tennessee.

2. Grant general relief.

E. K. Meacham, Attorney for Plaintiff, 324 Hamilton Bank Building, Chattanooga 2, Tennessee.

Of Counsel: J. W. Anderson, City Attorney, Chattanooga, Tennessee.

Duly sworn to by E. K. Meacham, jurat omitted in printing.

[fol. 137] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

[Title omitted]

ORDER ALLOWING BEN WEST PERMISSION TO FILE INTERVENING COMPLAINT AND TO BECOME A PARTY PLAINTIFF—November 23, 1959

In this cause, Ben West, Mayor, City of Nashville, Tennessee, having moved the Court to be allowed to intervene in the above entitled action as a party plaintiff thereto and to file an intervening complaint on behalf of himself and

all residents of the City of Nashville, Davidson County, Tennessee, and it appearing to the Court that Ben West, Mayor, has an interest in the above entitled action,

It is hereby Ordered that the intervening plaintiff, Ben West, Mayor, be allowed to file his intervening complaint and become a party plaintiff in this cause. The motion to dismiss the complaint heretofore filed on behalf of the defendants will be allowed to stand as a motion to dismiss to all intervening complaints.

John D. Martin, Marion S. Boyd, William E. Miller, U. S. Judges.

Hobart Atkins, Chandler, Manire & Chandler, Denney, Leftwich & Osborn, Attorneys for Plaintiffs.

Allison B. Humphrey, Attorney for Defendants, Solicitor General of the State of Tennessee.

Z. T. Osborn, Jr., Harris A. Gilbert, Special Counsel for City of Nashville.

Robert H. Jennings, City Attorney, City of Nashville, Tennessee.

[fol. 138] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

[Title omitted]

INTERVENING COMPLAINT OF BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE—Filed April 4, 1960

The intervener above named, in response to Resolution unanimously adopted by the City Council of the City of Nashville by leave of Court first had and obtained, files this, his Complaint of Intervention against the above named defendants, and says:

I.

Charles W. Baker, et al., the original plaintiffs herein, filed their complaint herein against the defendants, on or

about April 1959, alleging the original jurisdiction of this action to be in this Court by virtue of the Civil Rights Act, 42 U.S.C., 1983 and 1988, and 28 U.S.C., Sec. 1343, and further alleging that special provision is made for the relief sought by 28 U.S.C. 2281, et seq. The plaintiffs alleged themselves to be qualified voters of Tennessee and the defendants to be those officials of the State of Tennessee holding and representative of those holding elections in Tennessee, and particularly for office in the General Assembly of Tennessee; plaintiffs pleaded provisions of the [fol. 139] Constitution of the United States and of the State of Tennessee, guaranteeing to them free and equal elections and reasonably equal representation in the General Assembly of Tennessee, and they averred that they were deprived of the right to free and equal elections and prohibited reasonably equal representation in the General Assembly of Tennessee, by virtue of an unlawful and unconstitutional Act of Apportionment of seats in the General Assembly of Tennessee, Chapter 122 of the Public Acts of Tennessee of 1901, and now constituting Sections 3-101 to 3-109 of the Tennessee Code Annotated.

Plaintiffs averred the unconstitutionality of said Act when passed, for its flaunting of those requirements of the Constitutions of the United States and the State of Tennessee, and also its invalidity for its obsolescence, because of population changes occurring within the several counties and districts of Tennessee since the enactment of said Chapter 122 in 1901. Plaintiffs described a purposeful and systematic plan to by non-action discriminate against the geographical class of persons represented by them in order that the plaintiffs be denied equal protection of the law and be deprived of their properties without due process of law, and the plaintiffs pleaded instances in which the unconstitutionally apportioned General Assembly requires the plaintiffs and others similarly situated to bear a disproportionate share of the costs of government and the services rendered by it.

In several alternative and supplementary prayers for relief the plaintiffs prayed that the defendants and others of whom they are representative, be restrained from enforcing said unconstitutional Act of Apportionment against them, and for a declaration of their rights in the premises.

II.

The defendants herein, Joe C. Carr, George H. McCanless, Jerry McDonald, Dr. Sam Coward, James Alexander, and Hubert Brooks, filed their motion to dismiss the original action herein on the day of 1959.

[fol. 140] III.

The Honorable William E. Miller, District Judge, on the 31st day of July, 1959, filed an order and opinion denying the motion of the defendants to dismiss the original action without taking steps to constitute a Court of three Judges, and further, notifying the Chief Judge of the Sixth Circuit Court of Appeals of the pendency of the action. Thereafter, a constitution of a Court of three Judges under 28 U.S.C.A., Section 2281 was ordered by the Chief Judge.

IV.

Ben West, Mayor of the City of Nashville, acting on behalf of all the residents of the City of Nashville, Davidson County, Tennessee, intervening plaintiff, respectfully represents as follows:

1. That this Court has original jurisdiction of this action, and that the plaintiff has the right to bring this suit under the Civil Rights Act, 17th Stat. L. 13, and 16 Stat. L. 144; U.S. Code, Title 42, Secs. 1983 and 1988, as follows:

"Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at laws, suit in equity, or other proper proceeding for redress." (R.S. Sec. 1979)

"Section 1988. Proceedings in vindication of civil rights.

The jurisdiction in a civil and criminal matters conferred on the district courts by the provisions of this

chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, * * * "

Additionally, this Court has jurisdiction under 62 Stat. L. 932, 28 U.S.C. Section 1343 (3) and 1343 (4). This section reads as follows:

[fol. 141] "Section 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

* * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

V.

That, under 62 Stat. L. 968; 28 U.S.C. 2281 et seq. special provision is made for hearing causes of action involving restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state whenever said application is based on the unconstitutionality of such statute.

VI.

That the intervening plaintiff is a citizen of the United States and of the State of Tennessee, and is a qualified voter, taxpayer and father of children in the public school

system of the State of Tennessee, and is entitled to vote for the members of the Legislature of the State of Tennessee.

That further the plaintiff is Mayor of the City of Nashville, Tennessee, and was authorized by the City Council of [fol. 142] the City of Nashville, Tennessee, on November 3, 1959, by resolution attached hereto and made "Exhibit 1", to bring this action on behalf of all of the residents of the City of Nashville, who are residents of Davidson County, Tennessee. The population of the City of Nashville as of the 1950 Census was 174,307, and all residents of the City of Nashville are residents of Davidson County, Tennessee. That the City of Nashville, Tennessee is the capital of the State of Tennessee and the second largest city in the state.

That the aforenamed plaintiff brings this action on his own behalf and on behalf of all other voters in the State of Tennessee.

VII.

That the defendants are all citizens of the United States and of the State of Tennessee and reside within the said State. In Particular:

Defendant, *Joe C. Carr,* is the duly elected, qualified and acting Secretary of State of the State of Tennessee, with his office in Nashville in said State, and as such he is charged with the duty of furnishing blanks, envelopes and information slips to the County Election Commissioners, certifying the results of elections and maintaining the records thereof; and he is further ex officio charged, together with the Governor and the Attorney General, with the duty of examining the election returns received from the County Election Commissioners and declaring the election results, by the applicable provisions of the Tennessee Code Annotated, and by Chapter 164 of the Acts of 1949, inter alia.

Defendant, *George F. McCanless,* is the duly appointed and acting Attorney General of the State of Tennessee, with his office in Nashville in said State, and is charged with the duty of advising the officers of the State upon the law, and is made by Section 23-1107 of the Ten-

nessee Code Annotated a necessary party defendant in any declaratory judgment action where the constitutionality of statutes of the State of Tennessee is attacked, and he is ex officio charged, together with the Governor and the Secretary of State, with the duty of declaring the election results, under Section 2-140 of the Tennessee Code Annotated.

[fol. 143] Defendant, *Jerry McDonald*, is the duly appointed Coordinator of Elections in the State of Tennessee, with his office in Nashville, Tennessee, and as such official, is charged with the duties set forth in the public law enacted by the 1959 General Assembly of Tennessee creating said office.

Defendants, *Dr. Sam Coward*, *James Alexander*, and *Hubert Brooks* are the duly appointed and qualified members constituting the State Board of Elections, and as such they are charged with the duty of appointing the Election Commissioners for all the counties of the State of Tennessee, the organization and supervision of the biennial elections as provided by the Statutes of Tennessee, Chapter 9 of Title 2 of the Tennessee Code Annotated, Sections 2-901, et seq.

That this action is brought against the aforenamed defendants in their representative capacities, and that said Election Commissioners are sued also as representatives of all of the County Election Commissioners in the State of Tennessee, such persons being so numerous as to make it impracticable to bring them all before the Court; that there is a common question of law involved, namely, the constitutionality of Tennessee laws set forth in the Tennessee Code Annotated, Section 3-101 through Section 3-109 inclusive; that common relief is sought against all members of said Election Commissions in their official capacities, it being the duties of the aforesaid County Election Commissioners, within their respective jurisdictions, to appoint the judges of elections, to maintain the registry of qualified voters of said County, certify the results of elections held in said County to the defendants State Board of Elections and Secretary of State, and of preparing ballots and taking

other steps to prepare for and hold elections in said Counties by virtue of Sections 2-1201, et seq. of Tennessee Code Annotated, and Section 2-301, et seq. of Tennessee Code Annotated, and Chapter 164 of the Acts of 1949, inter alia.

[fol. 144] VIII.

That plaintiff and others similarly situated are now denied the right to equal suffrage in free and equal elections, which right is granted them by the Constitution of the State of Tennessee, and the equal protection of the laws, as guaranteed by both the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States, and he brings this action on his behalf and on behalf of all qualified voters of the State of Tennessee who are similarly situated, under Chapter 11 of Title 23 of the Tennessee Code Annotated, Sections 23-1101, et seq., and under the Federal Declaratory Judgment Act, 28 USCA 2201-2202, which reads as follows:

"2201. Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646. 62 Stat. 964; May 24, 1949, c. 139, s 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508 s 12 (P) 72 Stat. 349.

"2202. Further Relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

Plaintiff asks for a declaration of his rights and others similarly situated and a declaration of the validity or invalidity of the public acts or statutes which apportion the representatives and senators among the counties of the

State of Tennessee, and for such injunctive relief as may be proper to assure them and all other voters of the State of Tennessee free and equal franchise and equal protection of the laws which are now and have been for many years [fol. 145] denied them by the defendants and their predecessors in office who have complied with certain unconstitutional statutes, all of which are particularly set forth herein, and who have failed to comply with the Constitution of the State of Tennessee.

IX.

That Article 14, Sections 1 and 2 of the United States Constitution provides, in part, as follows:

1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

These provisions of the Constitution of the United States contains a guarantee to the citizens of the right to vote in state elections and that their votes shall be equally effective with any other votes cast in said state elections.

X.

That the Constitution of the State of Tennessee establishes, defines and guarantees to these plaintiffs, as well as to all other voters of the State of Tennessee, free and equal suffrage in free and equal elections by virtue of:

[fol. 146] (1) Section 5 of Article I established the rights of these plaintiffs and all other qualified voters of Tennessee to free and equal elections and suffrage:

> "Sec. 5. That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a Court of competent jurisdiction."

(2) Section 1 of Article IV defines qualified voters who are guaranteed the right to free and equal elections and suffrage in Section 5 of Article I, supra:

> "Section 1. Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President, and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage."

(3) Sections 3, 4, 5 and 6 of Article II define the term "General Assembly" as used in said Constitution, prescribe the method by which its members shall be chosen and set out a formula which must be applied every ten years in apportioning the members of the General Assembly among the counties of the State in accordance with the number of qualified voters residing in each of the counties respectively:

> "Sec. 3. The Legislative authority of this state shall be vested in a General Assembly which shall consist of

a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

"Sec. 4. An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

[fol. 147] "Sec. 5. The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; provided, that any county having two-thirds of the ratio shall be entitled to one member."

"Sec. 6. The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed one-third the number of Representatives. In apportioning the Senators among the different counties, in the apportionment of members of the House of Representatives, shall be made up to such county or counties in the Senate as near as may be practicable. When a district is composed of two or more counties they shall be adjoining, and no counties shall be divided in forming a district."

The intent and purpose of the aforesaid provisions of the said Constitution is that the members of the legislature must be elected by the people of the State of Tennessee on a basis of fair and equal representation of the individual electors in said State and that said senators and representatives must be equally apportioned throughout the State in districts which are arranged in proportion to the qualified voters therein. The intent and purpose of said provisions is that the Senate and House of Representatives both are dependent upon the people.

XI.

That the plaintiff, as a citizen of the United States, and of the State of Tennessee, has the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census, or the 1960 Federal Census, whichever may be applicable at the time of the final decree in this cause.

[fol. 148] That Sections 8 and 16 of Article XI of the Constitution of the State of Tennessee guarantees the rights of this plaintiff and all other qualified voters of the State of Tennessee to equal suffrage in free and equal elections as established in Section 5 of Article I and defined in Section 1 of Article IV, Sections 3, 4, 5 and 6 of Article II and Section 5 of Article I by denying to the Legislature the power to grant special privileges and extraordinary rights to the residents of individual counties.

"Sec. 8. The Legislature shall have no power to suspend any general law for the benefit of individuals, inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

"Sec. 16. The declaration of rights hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained is excepted out of the general powers of the government, and shall forever remain inviolate."

XII.

That the last reapportionment of the senatorial and representative districts followed the 1900 Federal Census and was established by Chapter 122 of the Public Acts of Tennessee of 1901; this chapter now constitutes Sections 3-101 to 3-109 of the Tennessee Code Annotated. There have been five Federal enumerations of the population of

the State of Tennessee since 1900, namely, 1910, 1920, 1930, 1940, and 1950. All of the Tennessee Legislatures after each such enumeration have been under a constitutional mandate in accordance with their oaths of office to support the Con- [fol. 149] stitution of the United States and Constitution of the State of Tennessee, described by Article II, Sections 3, 4, 5 and 6, of the Tennessee Constitution, to reapportion said senatorial and representative districts in accordance with the result of the latest available enumeration. Since the Federal Census of 1910, there have been numerous regular and extra sessions of the Tennessee Legislature; however, each and every such Legislature, including the present Legislature up to the time of the issuance of this complaint, despite repeated demands from its membership and despite the repeated introduction of bills which would correct the abuses complained of, has failed to reapportion and readjust the boundaries of said districts, all in violation of the Constitution of the United States and Constitution of the State of Tennessee.

XIII.

That since the 1870 Constitutional Convention and the constitutional apportionment of 1871, the Legislature of the State of Tennessee reapportioned itself three times, to wit, in the years 1881, 1891, and 1901. But, since 1901, no Legislature of the State of Tennessee has ever reapportioned itself, pursuant to the mandate of Article 2, Sections 3, 4, 5 and 6 of the Tennessee Constitution, or otherwise, except that certain minor modifications in the 1901 Legislature Apportionment Act were made in some subsequent years to adjust the boundaries of certain individual districts in a manner not material to this proceeding.

XIV.

That the plaintiff, as a citizen of the United States and the State of Tennessee, possesses the inherent right to vote [fol. 150] for members of the State Legislature and to cast votes that are equally effective with the votes of every other citizen of said State, that said rights are both recognized and guaranteed by the Constitution of the United

States and the Constitution of the State of Tennessee, but that, because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901, the plaintiff's vote, and the votes of all other citizens of Davidson County, and others similarly situated are not as effective as the votes of the voters residing in other senatorial and representative districts in the State of Tennessee, and not as effective as would be if the Legislature had reapportioned itself as required by the Constitution. The population of the State of Tennessee in 1900, based on the Federal Census of that year, was 2,021,000, while the population in 1950, based on the Federal Census of that year, was 3,292,000, and that the growth of the various counties of the State during this fifty year period has been very uneven.

XV.

That the last Reapportionment Act, Public Chapter 122 of the Acts of 1901, was invalid and violative of those provisions of the Constitution of Tennessee and of the United States heretofore quoted, in that prior to the enactment thereof the General Assembly of Tennessee made no enumeration of the qualified voters of Tennessee, as required by Article II, Section 4, of the Constitution of Tennessee, and as necessary for compliance with Amendment 14, Section 2, of the United States Constitution, and further in that the apportionment of Representatives and Senators, as provided in said Chapter 122, was made without reference to and despite the geographical location of the residences [fol. 151] of the qualified voters of the State of Tennessee, as reflected in the Federal Census of 1900; that apportionment of seats in the General Assembly made by said Chapter was wholly arbitrary, discriminatory, and, indeed, based upon no lawfully pertinent factor whatever.

XVI.

That the said Reapportionment Act of 1901, as amended, is unconstitutional because:

Said Act denies to Davidson County the additional number of Representatives and Senators to which Davidson

County is entitled and upon which the plaintiff, Ben West, Mayor, and his fellow voters are entitled to vote by virtue of the fact that Davidson County has had a sufficient number of qualified voters since prior to 1950 to entitle it to the additional members, as shown by Exhibit "A" and "B" attached to the original complaint and made a part hereof by reference.

The Senatorial districts and counties, as they were fixed by the Act of 1901, as amended, and from which the members of the Senate and House of Representatives in the General Assembly are elected, are not divided in accordance with the number of voters in each of the counties and districts, as is illustrated by Exhibits "C" and "D" attached to the original complaint and made a part hereof by reference and therefore, the distribution of Senators and Representatives is arbitrary and contrary to the provisions of the Tennessee Constitution; that plaintiff, and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly, and that he, and all others similarly situated, thereby are denied an equal [fol. 152] right to suffrage in free and equal elections and equal protection of the laws required by the Constitution of the State of Tennessee in Section 5 of Article 1, and in Sections 3, 4, 5 and 6 of Article II and Sections 8 and 16 of Article XI thereof.

Because of a purposeful and systematic plan to discriminate against a geographical class of persons and deny them due process of law and the equal protection of the law, this plaintiff and others similarly situated, are denied the equal protection of the laws and due process of law accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes

XVII.

That the preceding paragraph is illustrative of the discrimination now made among the various electoral districts of the State of Tennessee; that when all inequalities are taken together, the violations of the particular constitutional provisions set out above and as shown in Exhibits

"C" and "D" result in a distortion of the constitutional system as established, defined and guaranteed by the Constitution of the State of Tennessee and the Fourteenth Amendment to the Constitution of the United States; that this distortion of our system of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee, since a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate, as shown by Exhibit "E" attached to the original complaint and made a [fol. 153] part hereof by reference and that thus a minority now rules in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the basic principle of representative government as set out in the Constitution of the State of Tennessee in Section 1 of Article I, "That all power is inherent in the people and all free governments are founded on their authority and instituted for their peace, safety and happiness, for the advancement of those ends they have at all times an inalienable and indefeasible right to alter, abolish or reform the government in such manner as they think proper", and contrary to the philosophy of government and jurisprudence in the United States in which the Legislature has the power to make law only because it has the power and the duty to represent the people, and contrary to the Constitution of the State of Tennessee, Art. 2, Section 3, wherein it is provided that the Legislative authority is dependent upon the people.

XVIII.

The constitutional requirements of the State of Tennessee can only be met by a distribution of the representatives and senators among the counties of the State of Tennessee in accordance with their respective qualified voters, and the proper distribution of such representatives and senators may be provided mathematically by applying the constitutional formulae to the figures taken from the United States Census of 1950 showing the population of each County of the State of Tennessee, as approximately shown in Exhibits "A" and "B" attached to the original complaint and made a part hereof by reference.

XIX.

On information and belief, plaintiff avers that, for the purpose of informing the members of the 81st General [fol. 154] Assembly of Tennessee of the intentions of the original plaintiffs to seek reapportionment of the Legislature as is herein sought, the original plaintiffs, through their authorized attorneys at law, shortly after the convening of the 81st General Assembly of Tennessee, in January, 1959, addressed to each member of the Senate and House of Representatives and mailed same to the mail addresses of all of said Senators and Representatives, the following letter:

"Dear (Senator or Representative):

A number of citizens of Tennessee, especially interested in the proper apportionment of the Tennessee Legislature in accordance with the provisions of the State Constitution, have engaged attorneys at law to institute legal proceedings in the Federal Court if the present Tennessee Legislature does not enact legislation in conformity with the constitutional formula for reapportionment and the undersigned are among the attorneys engaged for this purpose.

We feel that it is proper to notify you, as a member of the 1959 General Assembly, of the contemplated institution of this suit for reapportionment, which will be based, in material part, on the failure of the present legislature to carry out the mandate of our Constitution. We wish to assure you that there is nothing personal in our approach, as counsel, to the proper solution of this long standing problem, but we feel that you should have knowledge beforehand of the plan referred to in order to take appropriate action before the adjournment of the present legislature.

With every good wish,

Yours very truly,

/s/ Walter Chandler
Hobart Atkins

[fol. 155] XX.

That the 81st General Assembly of Tennessee adjourned on the 20th day of March, 1959, without passing any bill or resolution to reapportion itself in conformity with the Constitution of Tennessee, although a number of bills or resolutions for such purpose were introduced during said session, and the following bills were voted on and defeated by recorded votes:

Senate Bill No. 524, to reapportion the Tennessee General Assembly, failed of passage in the Senate by a vote of 14 Ayes and 18 Noes. A transcript of the Journal of the Senate showing the action taken on said bill will be introduced at the hearing hereof.

Senate Bill No. 598, to reapportion the Tennessee Legislature in accordance with the Constitutional formula, failed of passage in the Senate by a vote of 13 Ayes and 20 Noes. A copy of said bill and a transcript of the journal of the Senate showing the action taken thereon is annexed to the original complaint as Exhibit "G" and made a part hereof by reference.

House Bill No. 760, a companion bill of Senate Bill No. 598, to reapportion the Tennessee General Assembly, failed of action in the House of Representatives.

House Joint Resolution No. 76, to direct the Legislative Council "to make a study of the steps taken by other states in recent years to reapportion the membership of their legislative bodies among the several counties or districts of said states," failed of passage in the House of Representatives by a vote of 37 Ayes and 54 Noes.

That by failing to pass the bills or adopting the resolution hereinabove mentioned, and by failing to enact a proper reapportionment law for the Legislature of 1961, as re- [fol. 156] quired by the provisions of the Constitution of Tennessee hereinabove cited, the 81st General Assembly of Tennessee continued the purposeful and systematic plan to discriminate against a geographic class of persons represented by the qualified voters enumerated in the Federal Census of 1950, thereby violating their solemn oaths to support the Constitution of Tennessee and the Constitution of the United States of America.

That by reason of the aforesaid failure of the 81st General Assembly of Tennessee to reapportion the legislative districts of the State in conformity with the Constitution of Tennessee, thus violating the constitutional rights of these plaintiffs and depriving them and others of due process and the equal protection of the laws, as hereinabove set forth, a serious justiciable controversy has arisen. The intervening plaintiff further states that neither the Constitution nor Statutes of the State of Tennessee provide for an initiative or referendum to correct the abuses complained of; nor does the Executive Branch have the power to correct said abuses. That the same laws of Tennessee as involved in the instant cause were before the Tennessee Supreme Court, the highest court in the state, in the cause of *Kidd* vs. *McCanless*, 200 Tenn. 273, 292 S.W. 2d. 40, Appeal Dismissed, 352 U. S. 920, 1 L. Ed. 2d, 157, 77 S. Ct. 223, but the Supreme Court of Tennessee refused to grant any equitable relief which would correct said abuses.

The historical summary of the failure of the Legislature to reapportion itself as prepared by the State Historian of the State of Tennessee, Dr. Robert White, is herewith attached and made Exhibit "2" of this Complaint. Plaintiff further avers that in view of the foregoing that all remedies [fol. 157] and forms of relief that are available to him through the Executive, Legislative and Judicial Branches of the Government of the State of Tennessee under its Constitution have been exhausted. Therefore, intervening plaintiff, Ben West, avers that he and others similarly situated have no possible remedy or relief except as may be awarded by this Honorable Court.

XXI

That the defendants, or their successors in office, unless prevented by this Court, will perform their duties as they and their predecessors in office have performed those duties for over fifty years under the unconstitutional Act of 1901, and the rights of this plaintiff and all other qualified voters of Tennessee similarly situated, can be protected only by decree of this Court declaring the Act of 1901, together with all Acts amending it, to be unconstitutional, and by

enjoining the defendants from holding another unconstitutional election in 1960, or thereafter, and by requiring either:

(a) that the defendants exercise their respective duties and prepare for the election of 1960, or subsequent elections as may be applicable, in such manner that the election will be held at large over the State as a whole, whereby every qualified voter shall have the right to vote for every member of the Senate and House of Representatives to be elected to the 1961 General Assembly, or subsequent General Assemblies as the circumstances may require, or

(b) That the defendants obey a decree of this Court redistricting the State by mathematically applying the formulae set out in the Constitution by referring to the 1950 official Federal Census population figures of the various counties of the State, or later Federal Census as may be applicable, unless and until the General Assembly of the State of Tennessee, by proper law, reapportions constitutionally the representatives and senators among the counties of the State.

[fol. 158]

XXII.

That the General Assembly of Tennessee, for a number of years, has denied to plaintiffs and others similarly situated the equal protection of the laws by unjustly discriminating against large segments of the population of the State in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the State through the exercise of the taxing power, as represented by statutes passed to raise and distribute revenue, notably for the support of the public schools of the State, counties, municipalities, and school districts, and for the maintenance of roads and highways, and for other purposes; that the said General Assembly, over a period of years, enacted and has maintained an arbitrary, unreasonable and discriminatory formula for the making of contributions to the needs of County governments, in that, of the seven cents (7¢) collected by the State for the storage and sale of each gallon of gasoline, "a sum equal to that derived from the levy of two cents for each gallon" is paid into a separate fund

known as "County Aid Funds," Section 54-403 of the Tennessee Code Annotated providing for the distribution of this fund in the following language:

> "Said 'county aid fund' so derived from the two cents (2¢) gasoline privilege tax, shall be derived and distributed by the department of highways and public works to the various counties of the state as follows: One-half (½) of said fund shall be distributed equally among the ninety-five (95) counties of the state, and fifty per cent (50%) of the balance shall be distributed among the ninety-five (95) counties on the basis of area and fifty per cent (50%) on basis of population, as of the most recent federal census, and shall be paid over monthly by the director of accounts of the state to the various county trustees, to be used by the county highway authorities in the building, repairing and improvement of county roads and bridges * * *";

[fol. 159] That distribution formula just above quoted works to take all but a small percentage of the gasoline tax paid by residents of Davidson County, situs of the City of Nashville, from them and distribute the same to those counties having an excessive and disproportionate representation in the unlawfully constituted General Assembly By application of this same formula to those funds collected by the United States of America for aid to the systems of roads maintained by the State, said unlawfully constituted General Assembly arbitrarily, unreasonably and discriminatorily distributes Federal funds excessively and disproportionately to those counties having excessive and disproportionate representation in the General Assembly. Section 54-611 makes a specific provision for the use of this formula insofar as Federal matching funds are concerned:

> "54-611. *Use, allocation and matching of federal funds—Formula.*—All funds provided for the federal aid secondary system of roads in this state by the federal aid secondary act of 1944 (Public Law 521, 78th Congress) and all amendments thereto and all funds hereafter allocated to said state system of rural roads by the commissioner of highways, with the approval of

the governor, from funds appropriated for or made available to the department of highways under existing laws or laws which may hereafter be passed, shall be expended by said rural roads division for the establishment and construction of roads and bridges on said state system of rural roads.

"The department of highways shall out of the funds allocated to the state system of rural roads first match the federal funds available under the federal aid secondary road program as now allocated to the various counties and the remainder of such funds so set aside and allocated to the state system of rural roads shall be expended in the various counties of the state upon the [fol. 160] state system of rural roads by the same formula upon which the two cent (2¢) gasoline tax is at the present time allocated to the various counties."

That by Public Chapter No. 14 enacted by the 1959 General Assembly, provision was made for the distribution of the taxes collected in support of the educational system of the State, whereby the pattern established in previous years by said unlawfully apportioned general assemblies has been continued by fixing first what purports to be a formula whereby each county's and city's ability to contribute to the education of the children therein is determined, and thereinafter exempting by proviso those over-represented counties from all application of the formula and guaranteeing to them school funds in the amounts previously had by such counties, despite their failure to contribute to their own educational systems on the basis required by said formula for the counties in which plaintiffs and others similarly situated live. A certified copy of said Act is attached hereto as Exhibit "3" and made a part hereof.

That, in the allocation of sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes, and other taxes levied on the people of the State of Tennessee by such unlawfully apportioned General Assemblies, the discriminations provided in said statutes have been made possible and effective by the failure or refusal of the Legislatures of the State of Tennessee to follow the mandates of the State Constitution requiring the reapportionment of the General

Assembly in each ten years after the year 1900. That said unlawfully apportioned General Assemblies will continue to refuse and fail to follow the mandates of the State Constitution because of the taxation benefits obtained by the systematic, continued and purposeful plan of discrimination hereinbefore set forth.

[fol. 161] Wherefore, Premises Considered, the intervener respectfully prays that this intervening complaint be filed, and that the intervener's rights be declared in the premises, to-wit:

A. That the present legislative apportionment of the State of Tennessee has deprived and continues to deprive the plaintiffs of liberty and property without due process of law, and has denied and continues to deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

B. That Sections 3-101 to 3-109, inclusive, of the Tennessee Code Annotated, are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of Tennessee, because of the failure to reapportion the legislative districts of the State of Tennessee in accordance with present qualified voters as herein averred.

C. That the right of the plaintiffs to vote as guaranteed by Article 1, Section 5, and Article 4, Section 1, of the Constitution of the State of Tennessee has been impaired.

And Plaintiffs further particularly pray that, after hearing of this action, the Court grant further relief in accordance with 62 Stat. L. 964, 28 U. S. C. Section 2202 as follows:

D. For the entry of a judgment declaring it to be the right of the plaintiff and others similarly situated to have the legislative authority of Tennessee vested in a General Assembly consisting of a Senate and House of Representatives dependent upon the people of Tennessee, as provided in Section 3 of Article II of the Constitution of Tennessee, [fol. 162] consisting of ninety-nine members in the House and thirty-three members in the Senate, and that this right had by the plaintiff and others, citizens of Tennessee, is in no way dependent upon action or non-action by any past

or future General Assembly, but instead is based and depends upon that Constitution had by the people of Tennessee.

E. And the plaintiff prays further that his right in said Legislature be declared to exist despite the purposeful and systematic plan of refusal to act in the apportionment of said seats in the Legislature by those General Assemblies serving since the year 1901 and that, for the failure of those General Assemblies so serving to make a constitutional apportionment of said General Assembly seats, the same is and shall remain unapportioned, unless and until the General Assembly enacts an Act of Apportionment in accordance with the requirements of the Constitution of the United States and of the State of Tennessee, and that, pending such Act of Apportionment, plaintiff and all of the citizens of Tennessee be allowed an exactly equal voice in the election of members of the General Assembly through elections at large.

F. For an injunction restraining and prohibiting the defendants from enforcing Sections 3-301 to 3-309, inclusive, of Tennessee Code Annotated, against the intervenor and others similarly situated, by furnishing forms for nominations, receiving nomination petitions and papers, certification of nominations of election, or any other act necessary to the holding of elections for members of the General Assembly of Tennessee, as apportioned by said invalid Code Sections.

[fol. 163] Or, in the Alternative,

That the defendants, and each of them, be restrained and prohibited from doing any act necessary to the holding of elections for members of the Tennessee Legislature other than from counties and districts to which seats in the General Assembly are apportioned, in accordance with that mathematical formula of apportionment expressed in the Constitution of Tennessee.

G. For such other and further relief as may seem just, equitable and proper.

This is the first application for extraordinary process in this cause by the intervening plaintiff.

Ben West, Mayor of Nashville.

Robert H. Jennings, Jr., City Attorney for the City of Nashville; Harris Gilbert, Special Counsel to the City Attorney; Denney, Leftwich & Osborn, Special Counsel to the City Attorney.

[fol. 164] *Duly sworn to by Ben West, jurat omitted in printing.*

[fol. 165]

EXHIBIT 1 TO INTERVENING COMPLAINT

CITY COUNCIL RESOLUTION 59-198

AUTHORIZING THE MAYOR OF THE CITY OF NASHVILLE TO INTERVENE AND PARTICIPATE IN THE CASE BAKER, ET AL., vs. CARR, ET AL., PENDING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, AND HAVING AS ITS OBJECT THE REAPPORTIONMENT OF THE GENERAL ASSEMBLY OF TENNESSEE.

WHEREAS, no Act of Apportionment of the General Assembly of Tennessee has been enacted since 1901 A.D., despite the requirements of the Constitution of Tennessee that the General Assembly be apportioned among the qualified voters of the State equally at ten-year intervals, and

WHEREAS, the Apportionment Act of 1901 worked to deprive Davidson County and the citizens of Nashville, Tennessee, of a portion of the representation previously had by it, although the qualified voters of this community were then entitled to increased representation in the General Assembly and the almost sixty years which have passed have worked to further debase the electoral franchise had by the citizens of Nashville and Davidson County, Tennessee, in that the population of this community has steadily increased, and

WHEREAS, representation in the General Assembly is now so grossly unequal that in some instances voters of one County have as much as twenty times the representation as is had by the voters and citizens of Nashville, David-

son County, Tennessee, whereby the citizens and voters of this County and others similarly situated are deprived of the equal protection of the laws, and

[fol. 166] WHEREAS, the debasement of the right to vote had by the people of Nashville, Tennessee, and other areas in Tennessee similarly situated, is such that said Apportionment Act of 1901 now requires that less than 40% of the people of Tennessee elect 66⅔% of the House of Representatives, while one-third of the people of Tennessee elect two-thirds of the State Senate, and said Act prohibits the election of a General Assembly representative of a majority of the people of Tennessee, and, is, therefore, wholly unfair, undemocratic and absolutely unconstitutional, and

WHEREAS, that unlawfully constituted majority of the General Assembly has exercised its unconstitutional authority over the citizens of Nashville and other areas similarly situated, by requiring an unequal sharing in the cost of government in Tennessee, to the point that the metropolitan areas of Tennessee are required to overburden their citizens and taxpayers with taxation, while many rural communities pay all but a nominal part of their governmental expense out of the taxes collected by the State of Tennessee in said metropolitan communities, and

WHEREAS, there is no apparent relief in sight from the taxation without representation presently existing in Tennessee, and the disproportionate expense of government now borne by the citizens of Nashville will in all probability be increased unless some relief is found, and

WHEREAS, the people of the City of Nashville are deprived of any political remedy, in that they are not per-
[fol. 167] mitted to vote for or against that absolute majority of the General Assembly apportioned to the over-represented areas of the State of Tennessee, and

WHEREAS, a group of City and County officials and individual citizens of Tennessee have sought relief in the United States District Court at Nashville, in the case Baker, et al. v. Carr, et al., and in their cause seek a declaration of

the invalidity of the Apportionment Act of 1901 and a reapportionment of the General Assembly of the State of Tennessee, and

WHEREAS, the people of Nashville and Davidson County, Tennessee would benefit financially and would with all others in Tennessee benefit by an enforced respect for and observance of the supreme organic law of Tennessee, and it is in the best interest of the City of Nashville that the cause of the people of the City of Nashville be presented to that three Judge District Court assigned and established for the trial of said case, now, therefore,

BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF NASHVILLE AS FOLLOWS:

SECTION 1. That the Mayor of the City of Nashville be and he is hereby authorized to intervene and participate in said case in the United States District Court, Baker, et al., v. Carr, et al., and to take any and all necessary steps in proving the long continued mistreatment of the people of the City of Nashville at the hands of the unlawfully [fol. 168] apportioned General Assemblies of Tennessee convened pursuant to the Apportionment Act of 1901.

SECTION 2. BE IT FURTHER RESOLVED, that this Resotion take effect from and after its adoption, the welfare of the City requiring it.

Introduced By: A. D. GILLEM /s/
Member of Council

Recommended by:

BEN WEST /s/
Mayor

Approved as to form and legality:

ROBERT H. JENNINGS, JR. /s/
City Attorney

I hereby certify that this is a true and correct copy of the Original Resolution No. 59-198 of the City Council, of the City of Nashville, Tenn.

Witness my hand and the Seal of the City of Nashville, Tenn., this 12 day of November, 1959.

/s/ F. M. Carr, Jr.
City Clerk

(Seal)

[fol. 169]

Exhibit 2 to Intervening Complaint

A DOCUMENTED SURVEY OF LEGISLATIVE APPORTIONMENT IN TENNESSEE, 1870-1929

The present Constitution of Tennessee requires that an apportionment of the members of the Legislature be made every ten years, beginning in the year 1871 and every ten years thereafter.[1] The Constitution further provides that said apportionment shall be based upon the number of qualified voters in each Legislative and Senatorial District.[2]

The Thirty Seventh General Assembly convened on October 2, 1871. Five days later (October 7), Thomas H. Butler, Secretary of State, transmitted to the Legislature a Report[3] showing "the number of male inhabitants of the State, of twenty-one years of age and upwards." Secretary Butler's Report disclosed that fifteen counties had not sent in their reports. The seventy-eight counties reporting listed a total of 237,431 qualified voters. In order to give an approximate total number of qualified voters, Secretary Butler annexed to his Report the number of voters in the unreported counties in the last election for Governor, amounting to 12,594. When this figure was added to the figures of the reporting counties, the total number of qualified voters was given as being 250,025. Ten days later, Senator J. M. Coulter introduced Senate Joint Resolution No. 18 which was as follows:[4]

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[1] 1870 *Constitution of Tennessee*, Article 11, Sections 4, 5, and 6.

[2] *Ibid.*

[3] *Appendix to Senate Journal*, 1871, 41-43.

[4] *Senate Journal*, 1871, 46-47.

"Be it resolved by the General Assembly of the State of Tennessee, that in view of the short period allowed for legislation, and the vast amount of labor connected with re-districting of the State—the impossibility of doing so without the census returns of the voting population from each county, the Secretary of State be requested to use prompt measures to secure complete returns at the earliest day practicable."

[fol. 170] The Coulter Resolution was routinely adopted in each House, and approved by the Governor.[5]

On the second day of the legislative session, Representative T. H. Paine introduced House Joint Resolution No. 4 which provided for the appointment of a committee to redistrict the State.[6] The resolution was adopted by each branch of the Legislature and approved by the Governor[7] on October 17. The re-districting committee was to consist of nine members, three from each Grand Division of the State on the part of the House, and six on the part of the Senate.[8] Some five weeks later, (November 28, 1871) this Redistricting Committee submitted a redistricting bill and recommended its passage.[9]

The legislative Journals and Acts do not disclose whether the Secretary of State obtained any further reports from the fifteen delinquent counties. From the marginal entries on the manuscript copy of Secretary Butler's Report[10] it is clearly indicated that the bulk of the work of taking the voting census was performed during the summer and early fall of 1871.

The Senate Redistricting Bill No. 221, passed first and second readings in the Senate, but on December 9, House Bill No. 417 was adopted by the Senate in lieu of the Senate

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[5] *Ibid.*, 96.

[6] House Journal, 1871, 21.

[7] *Ibid.*, 86.

[8] Acts of Tennessee, 1871. Resolution VIII, 187.

[9] Senate Journal, 1871, 262.

[10] See Exhibit 1, Butlers Report.

Bill.[11] After various amendments, the Redistricting Committee Bill was passed[12] on December 11, 1871, in the Senate by a vote of 21 to 4. The House had passed[13] the bill on December 6 by a vote of 48 to 23. The bill, now enacted into law,[14] is Chapter 146, Acts of Tennessee, 1871, the title being "An Act to apportion the Senatorial and Representative Districts in the State of Tennessee."

[fol. 171] As usual, protests were registered against the passage of the apportionment law by certain members of the Legislature. Representatives Jacob Leach and James P. Doss maintained that the apportionment law was

> "A system of representation as correct in principle as that in the days of George the Third . . . We have no language to express our indignation as this maneuver. We, therefore, enter our eternal aversion to unfair representation in a free government." [15]

Representative J. C. Parker voiced his condemnation of the bill by concluding his protest with this salvo:

> "The tyranny of the majority silenced the voice of reason and the appeal of justice." [16]

The basis for census taking in 1871 was the enactment of a law[17] authorizing and directing the County Courts of each county to elect a Commissioner to take an enumeration of all male inhabitants twenty-one years of age and upwards and file same with the County Court Clerk who was directed to transmit a certified copy of same to the Secretary of State, who, in turn, was directed to present same to the Legislature. The compensation of the various commissioners

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[11] Senate Journal, 1871, 355.

[12] *Ibid.*, 368.

[13] House Journal, 1871, 365.

[14] Acts of Tennessee, 1871, Chapter 146.

[15] *House Journal*, 1871, 367.

[16] *Ibid.*, 378.

[17] *Acts of Tennessee*, 1870, Chapter 107.

was set at three dollars for each one hundred names enumerated and returned by him to the County Court Clerk. [fol. 172] The next reapportionment year was 1881. The outgoing Governor, Democratic Albert S. Marks, in his valedictory message to the Legislature reminded that body of a constitutional mandate calling for reapportionment.[18] The incoming Governor, Republican Alvin Hawkins, made no reference to apportionment in his message to the Legislature.[19]

The only legislative action by the Forty-Second General Assembly in its regular session touching reapportionment was the enactment of a law dealing with the method of taking a census of the voting population. Such a bill was introduced on February 2, 1881, by Senator Bash M. Tillman.[20] The bill was tossed back and forth for various amendments and did not obtain passage in both branches of the Legislature until April 2, 1881, five days before *sine die* adjournment.[21] The Governor approved[22] the bill on the last day of the legislative session, April 7, 1881.

The above law[23] authorized the Governor to appoint "one or more suitable persons for each county of the State, upon the recommendation of Senators and Representatives of the respective counties", to be known as Commissioners who were to make an enumeration of the voters of the requisite age and residential requirements. The compensation was set at three cents for each person enumerated and reported.

Section 4 of the above law made the following provision, to wit:

> "That said Commissioners so appointed shall have access to the U. S. Census Reports of the enumeration

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[18] Senate Journal, 1881, 128.
House Journal, 1881, 66-67.

[19] Senate Journal, 1881, 372-387.
House Journal, 1881, 462-480.

[20] Senate Journal, 1881, 291.

[21] House Journal, 1881, 895.

[22] House Journal, 1881, 995.

[23] Acts of Tennessee, 1881.

> of 1880, on file in the offices of the County Court Clerks of the State, and a reference to said reports by said Commissioners shall be legitimate as an auxiliary in the enumeration required by the provisions of this act."

[fol. 173] As is obvious, the constitutional requirement for legislative reapportionment in 1881 was not complied with by the Legislature at its regular session from January 3, 1881 to April 7, 1881.

On November 18, 1881, Governor Alvin Hawkins called the Legislature into extra session on December 7, 1881, setting forth eleven specific topics for legislative action.[24] Item No. 1 was:

> "To fix and declare the number of Senators and Representatives composing the General Assembly of the State of Tennessee, and make an apportionment of the same, as provided by secs. 4, 5, and 6, of Art 2 of the Constitution of the State."

On the opening day of the legislative session, Secretary of State David A Nunn, submitted a report showing the voting population of the State, by counties as ascertained by the census reports from the various counties. The total number[25] of qualified voters was reported as being 343,817. In view of the increase in total population of the State, as disclosed by the Federal Census of 1880, the membership of the General Assembly was increased to thirty-three Senators and ninety-nine Representatives.[26] This increase in legislative membership, though mildly disapproved by Governor Hawkins in his message, was fully warranted by the Constitution itself, in that the Federal Census of 1880 showed a total population in Tennessee in excess of "one million and a half."[27]

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[24] *Senate Journal* (First Extra Session), 1881, 3-5.

[24] *House Journal* (First Extra Session), 1881, 4-6.

[25] *House Journal* (First Extra Session), 1881, 12-14.
Note: See photostat copy of report, Exhibit No. 2.

[26] *Acts of Tennessee* (First Extra Session), 1881, Chapter 5.

[27] *Constitution of Tennessee*, 1870, Article ii, Section 5.

[fol. 174] As per the usual legislative procedure, various and sundry amendments were offered on the pending bill concerning apportionment. After all amendments were disposed of, the reapportionment bill was finally enacted into law.[28]

Inasmuch as Congressional reapportionment had been ignored by the regular session and the first extra session of the Legislature, Governor Hawkins felt impelled to call a second extra session which he did on March 16, 1882. Item No. 1, in the Governor's Proclamation, was as follows:

> "1st. Redistricting the State into ten Congressional Districts, and providing for proper representation in the Congress of the United States."

Without too much ado, Congressional apportionment was taken care of on April 27, 1882, when the bill was given the approval of the Governor.[29]

[fol. 175] In the Act of 1881, Chapter 124, it will be noted that the law providing for taking a census of the voting population differed in two respects from a similar law passed in 1870. The 1881 Act placed upon the Governor the duty of appointing the County Census enumerators rather than having that function executed by the various County Courts. A new provision was also inserted in Section 4 of the 1881 law, namely, that the Census enumerators were vested with the right of having access to the U. S. Census Reports "and a reference to said reports by said Commissioners shall be legitimate as an auxiliary in the enumeration required by the provision of this act." To what extent, if any, the census enumerations is not disclosed in Secretary of State Nunn's report to the Legislature. Furthermore, no light is shed upon this particular matter in the official legislative *Journals* of 1881.

Following the legislative precedent of 1881, the 1891 Legislature by-passed apportionment due to be made that year. Neither the out-going or in-coming Governor referred to the apportionment topics in his respective messages. But the Legislature recognized its responsibility in regard to

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[28] *Acts of Tennessee* (First Extra Session), 1881, Chapter 6.

[29] *Acts of Tennessee* (Second Extra Session), 1882, Chapter 27.

reapportionment. In the third week of its session, a law was passed providing for the taking of a census of the male inhabitants of voting age in the State.[20] "As soon as this Act becomes a law," the Governor was directed to appoint Census Commissioners in the several counties who were to take a census of the qualified voters and certify said lists to the County Court Clerk not later than February 21, 1891. The County Court Clerk was ordered to make a list of all enumerations filed with him within five days after receipt of same, and forward same to the Secretary of State. The [fol. 176] Secretary of State was instructed to present the figures "to the General Assembly now in session, or hereafter to meet." The above law embodied the same provision as found in the Act of 1881, namely:

> "That said Commissioners so appointed shall have access to the U. S. Census Reports of the enumeration of 1890, on file in the office of the County Court Clerk of the State, and a reference to said reports by said commissioners shall be legitimate as an auxiliary in the enumeration required by the provisions of this Act."[21]

On January 24, 1891, a Joint Resolution was adopted "Ordered the Secretary of State to make out necessary documents in order to carry out the sense of the Enumeration Bill."[22]

On March 21, 1891, just nine days before *sine die* adjournment, Senator Dorsey O. Thomas, Chairman of the Redistricting Committee, submitted the Report of the Census as presented by the Secretary of State. The laconic statement throws no light whatsoever upon the contents of the Census Report, namely,

> "The Secretary of State, through Mr. Thomas, the Chairman of the Redistricting Committee, submitted his report of the census, which was referred to the Redistricting Committee."[23]

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[20] *Acts of Tennessee*, 1891, Chapter 22.

[21] *Ibid.*, Section 4.

[22] *Senate Journal*, 1891, 86.

[23] *Ibid.*, 414.

[fol. 177] On the day preceding the presentation of the above report, Senator Thomas introduced Senate Bill No. 452 "To apportion the Representatives of the State of Tennessee in the Congress of the United States."[34] On March 26, the Redistricting Committee recommended the above bill for passage.[35] On March 26, House Bill 525 on the same subject was substituted for the Senate Bill, and on a third reading the following vote was recorded: Ayes 18; Noes 2. The Bill failed for lack of a quorum.[36] On the following day the bill was called up and was passed by a vote of 21 to 10.[37] On March 30, 1891, the closing day of the legislative session, the governor approved said bill which was "An Act to apportion the Representatives of the State in the Congress of the United States."[38]

Just three days before *sine die* adjournment, a supplementary report[39] of the census of qualified voters was presented to the Legislature by the Secretary of State. The "Voting Population" was given by counties, the total being 399,575.

[fol. 178] Secretary of State, C. A. Miller concluded his report with the following explanation:

> "The above is from figures officially reported to me, except the counties of Bledsoe, Lincoln and Montgomery. In Bledsoe County the two enumerators appointed refused to act. In Lincoln and Montgomery counties, the County Clerks inform me that the reports of the enumerators have not yet been returned to their offices as required by law. And the estimates of said counties are made from information furnished by the County Court Clerk in Lincoln County, and from the enumerator in Montgomery County. The estimate of Bledsoe County is made by comparison with returns

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[34] *Ibid.*, 395.

[35] *Ibid.*, 443.

[36] *Ibid.*, 454-455.

[37] *Ibid.*, 463.

[38] *Acts of Tennessee*, 1891, Chapter 131.

[39] *Senate Journal*, 1891, 473-474.

> from other counties having about same population as shown by the census of 1890. I make this incomplete report because of the fact that the session is drawing near a close, and if possible to enable this session to act and save the State the large expense of an extra session. Respectfully submitted,
>
> C. A. Miller, Sec'y State."

From the above sketch, it is obvious that legislative "delaying action" on reapportionment in 1891 may have been partially due to the tardy report of the Secretary of State, inasmuch as his report was not presented to the Legislature only three days before adjournment. Undoubtedly, he had difficulty in getting returns from the County Court Clerks, who, in turn, had to wait for census returns made by the local census enumerators. Even so, the final report was admittedly incomplete. Notwithstanding the above handicaps, the Legislature nevertheless passed a Congressional Reapportionment Act[40] at its regular session in 1891.

It is quite a different story *re* legislative apportionment. On March 21, 1891, Representative Jefferson Davis Casselberry representing Hardeman and Fayette Counties introduced House Bill No. 725 "To apportion the State in Senatorial and Representative Districts."[41] Routinely the bill passed second reading two days later and was likewise referred to the Redistricting Committee.[42] On March 25, 1891, the above committee reported as follows:

> [fol. 179] "Mr. Speaker: The Redistricting Committee have carefully considered House Bill No. 525, and report the bill, with the accompanying substitute, for passage."[43]

On March 27, 1891, the Redistricting Committee recommended for passage House Bill 725 (legislative apportionment) with an accompanying substitute.[44] Three days

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[40] Acts of Tennessee, 1891.

[41] House Journal, 1891, 402.

[42] *Ibid.*, 411.

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[44] *Ibid.*, 462.

later, March 30, the House took up House Bill 456 which was a bill dealing also with legislative apportionment.[45] Hereupon, considerable jockeying took place in the form of proposed amendments, offering a substitute bill, *et cetera*.[46]

Here is the status of the legislative apportionment business on next day to *sine die* adjournment. The Senate had passed by a vote of 22 to 8 the Senate bill to apportion Senatorial and Legislative Seats.[47] On the closing day, the House passed a substitute bill by a vote of 54 to 5.[48] Each branch had passed a *legislative* reapportionment bill, but no one bill was passed by both branches. Consequently, no reapportionment law had been enacted.

[fol. 180] In view of the fact that the Legislature had during its regular session become "fould up" over legislative apportionment and had failed to enact any law upon that matter, Governor John P. Buchanan called the Legislature into extra session[49] on August 31, 1891. Of the twelve specific items mentioned in Governor Buchanan's Proclamation, item 5 was as follows:

> "To pass an act dividing the State into representative, floterial, and senatorial districts, and apportioning Representatives and Senators among those districts as required by the Constitution." [50]

In his Message to the Legislature on the opening day, Governor Buchanan pointed out specifically that

> "The Constitution requires that the State shall be redistricted every ten years into new representative,

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[45] *Ibid.*, 485.
Author's note:
The House Journal erroneously lists the bill as No. 476.

[46] *Ibid.*, 486-487.

[47] Senate Journal, 1891, 480.

[48] House Journal, 1891, 487.

[49] Senate Journal (Extra Session), 1891, 4-5.
House Journal (Extra Session), 1891, 4-5.

[50] *Ibid.*

floterial, and senatorial districts, and that Representatives and Senators shall be apportioned according to the census. Unless this apportionment is made, great confusion may be caused, for those counties which have gained in the last census will follow the recent enumeration, while those that have lost will follow the old enumeration, and there will be no authority to decide who shall be entitled to seats in the next Legislature." [51]

[fol. 181] The Legislature did not attempt the reapportionment problem until the ninth day of the session. No valid criticism can be lodged against those members for the slight delay, due to the tense excitement incident to a serious clash between the local coal miners of Anderson County and penitentiary convicts who had been leased to a private concern which condition produced sharp competition and irritating situations. Mob violence flared up to such an extent that Governor Buchanan called out ten companies of the State militia in an effort to quell the riot. All of this had occurred about two weeks before the Legislature convened in extra session on August 31, 1891.

At this faraway date, it is perhaps a bit hazardous to attempt to diagnose the temper of this legislative body in the extra session of 1891. The coalminer riots had unquestionably disturbed the public peace. This situation called forth a long explanation on the part of Governor Buchanan who had called out the State militia[52] without legislative approval. For this action, he was accused of having violated Section 5 of Article III of the State Constitution. Another factor concerned the introduction of a batch of silly bills such as "to prevent wife beating", "to prevent the stealing of fruits from gardens," and "to prohibit prize-fighting." Perhaps this latter class of bills served as a sort of antidote to relieve the tenseness of the times on account of the coal miner revolt.

At any rate, on September 8, 1891, Senator T. C. Long of Madison County introduced Senate Bill No. 32 to appor-

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[51] Senate Journal (Extra Session), 1891, 8.
House Journal (Extra Session), 1891.

[52] Senate Journal (Extra Session), 1891, 9-22.

tion the various counties of the State into proper legislative districts.[53] On the same day, a bill on the same subject was introduced in the House by Rep. J. D. Casselberry.[54] [fol. 182] Another bill on the same subject was rejected.[55] On September 16, five days before adjournment, the Long bill was amended by striking out everything after the enacting clause and inserting a list of the counties comprising the various districts together with the number of Representatives and Senators allotted to each.[56] This amended bill was passed in the Senate by a vote of 21 to 8. The above bill was passed in the House[57] by a vote of 61 to 16.

A reapportionment law[58] had been enacted, even though a special session of the Legislature had been required to consummate that objective.

[fol. 183] In point of chronology, we now arrive at the time of the enactment of the last legislative apportionment law in Tennessee, namely, 1901. That law is Chapter 122, passed by the Legislature on April 2, 1901, and approved by Governor Benton McMillin on the following day.[59]

The opening gun relative to apportionment in 1901 was fired on January 9, by Dr. J. C. Drennan, Democratic Senator from Cannon County.[60] Senator Drennan's bill[61] provided for an enumeration of voters to be made prior to the enactment of a reapportionment statute. The Drennan bill embodied substantially the features of previous enumeration laws by empowering the Governor to appoint enumerators in each county who were to certify their findings to the County Court Clerks who, in turn, reported to the Secretary of State. Next, the Secretary of State submitted the

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[53] *Ibid.*, 49.

[54] House Journal (Extra Session), 1891, 73.

[55] *Ibid.*, 111.

[56] *Senate Journal* (Extra Session), 1891, 85-88.

[57] *House Journal* (Extra Session), 1891, 109.

[58] *Acts of Tennessee*, 1891, Chapter 131.

[59] *Acts of Tennessee*, 1901, Chapter 122.

[60] *Senate Journal*, 1901, 33.

[61] Original manuscript bill in State Archives.

census report to the Legislature. The Drennan bill, including an amendment, was passed in the Senate[62] by a vote of 21 to 4. On January 31, the Redistricting Committee recommended the tabling of the Drennan measure[63] which was done by the House on the same day.[64]

A week later, February 7, Democratic Senator John M. Davis of Morgan County introduced Senate Joint Resolution No. 35 "to provide for enumeration of the voters of the State."[65] The Resolution[66] which was adopted by both houses was as follows:

> "WHEREAS, Under the provisions of the Constitution of the State of Tennessee an enumeration of the qualified voters of the State of Tennessee shall be made once in every ten years; and
>
> WHEREAS, The Constitution is silent upon the manner in which said enumeration shall be made; and,
>
> WHEREAS, It would incur an expense of about $20,000 on the taxpayers of Tennessee to make said enumeration by an actual canvass by enumerators in the various counties of the State; and
>
> [fol. 184] WHEREAS, The Federal census of 1900 has been very recently taken and by reference to said Federal census an accurate enumeration of the qualified voters of the respective counties of the State of Tennessee can be ascertained and thereby save the expense of an actual enumeration; therefor,
>
> *Be It Resolved*, That the Redistricting Committee authorized to sit during the recess for the purpose of preparing and reporting to this General Assembly a redistricting bill, be, and is hereby authorized and directed to make an enumeration of the qualified voters

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[62] *Senate Journal*, 1901, 85.

[63] *House Journal*, 1901, 193.

[64] *Ibid.*, 1901, 200.

[65] *Senate Journal*, 1901, 213.

[66] *Acts of Tennessee*, 1901, pp. 1260-1261.

of the State. And in making said enumeration said committee are authorized and directed to confer with the proper authorities at Washington for the purpose of procuring such information as will enable them to ascertain the number of qualified voters in each of the various counties of the State of Tennessee. *And said enumeration, when prepared by the said Redistricting Committee, shall be turned over to the Secretary of State and be filed by him in his office.*

Adopted February 7, 1901.

NEWTON H. WHITE,
Speaker of the Senate.

E. B. WILSON,
Speaker of the House of Representatives.

Approved February 8, 1901. BENTON MCMILLIN,
Governor."

It will be noted that the Resolution purported to be an "economy measure" in that census enumerators were eliminated at an estimated saving of $20,000.00 and a resort to and reliance upon the recent Federal Census was to be the source of ascertaining the number of qualified voters in the State. A further provision of the Resolution was that the Redistricting Committee was to sit during the legislative recess, that lasted from February 8 to March 11, and "prepare and report to the General Assembly a redistricting bill."[67]

The Redistricting Committee[68] on the part of the Senate was as follows:

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[67] Note. The above Resolution provided that the Redistricting Committee was to turn over the enumeration of voters to the Secretary of State to be filed in his office. An exhaustive search of the records in the office of Secretary of State and of the State Archives was unproductive, in that no such report was located.

[68] *Senate Journal*, 1901, 42.

[fol. 185] *Redistricting Committee*:

John M. Davis, Chairman, Morgan County
H. B. Tharp, Haywood County
F. J. Caldwell, Lake County
R. H. Fryer, Carroll County
E. E. Erwin, Maury County
C. P. Warfield, Montgomery County
J. J. Bean, Moore County
Ed. T. Seay, Sumner County
R. B. Williams, Franklin County
J. I. Cox, Sullivan County
C. C. Howell, Knox County.

According to the Senate roster, Senator Howell was the only Republican named on the Redistricting Committee, and the roll call shows that he was frequently absent on account of illness.

The House[49] members of the Redistricting Committee were:

Joseph E. Foust, Chairman, Trousdale County
Austin Peay, Montgomery County
Milton C. Sidwell, Clay County
William Pillow McClure, Marshall County
Harvey Alexander, Obion County
Robert Lee Peck, Robertson County
W. B. Romine, Giles County
John Paul Murphy, Knox County
John T. Peeler, Carroll County
Gilmer P. Smith, Shelby County
John Wesley Chumley, Claiborne County
David Carter Waters, Cocke County

The *House Journal* does not disclose the political affiliation of the above Representatives.

[fol. 186] The official legislative *Journals* shed no light upon the procedures invoked by the redistricting Committee during the legislative recess of one month. Newspaper articles appear to be the main sources of information in

[49] *House Journal*, 1901, 90 and 97.

this matter. According to a local (Nashville) newspaper,[70] the Committee was scheduled to meet on February 18 to "begin their work of redistricting the State." Toward the end of the article, it was asserted that:

> "The committee hold it to be their duty unde the law to redistrict the State according to its present population. They will adhere to getting the voting population from the figures of the Federal Census just completed, instead of retaking this census which it is figured will cost the State $20,000 if done."

Two days later, the same newspaper[71] reported that a map of the Congressional Districts had been prepared showing the counties and the population of each under the 1900 Federal Census. Furthermore, notice was given that:

> "the committee asks that all interested in any way in the redistricting of the congressional districts communicate their desires to the Committee either in person or by letter not later than Friday night" (February 22).

It was further stated that the Committee would meet every morning at the Tulane Hotel by 9 o'clock.

If newspaper assertions may be relied upon, the Redistricting Committee held "open house" to receive suggestions, but the disposition of such suggestions was disposed of in Star Chamber deliberations. For instance, it was alleged that a member of the Committee:

> "before he was sworn to secrecy, disclosed that at a secret session last week it was decided to take Morgan (County) from the Second and place it in the Fourth, to take out Sevier and place it in the First, and change Hamblen from the First to the Second. This has positively been decided upon by the Committee as its recommendation . . . "[72]

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[70] Nashville American, Feb. 17, 1901.

[71] *Ibid.*, February 19, 1901.

[72] Knoxville Journal and Tribune, February 25, 1901.

[fol. 187] On March 11, the day on which the Legislature reconvened after the recess, a contemporary newspaper[73] asserted that

> "The Redistricting Committee of the General Assembly has been busily engaged during the recess in arranging for reshaping the districts of the State. . . . The work has been decided upon by the Committee, and the representation has been based on the Federal Census of 1900. . . . "

The above newspaper in the same issue printed a list, by counties, of the proposed Congressional Districts, and also the apportionment for legislative seats, quoting the exact language of the caption of the bill that was enacted later into a law, namely,

> "An act to apportion the several counties of this State into senatorial and representative districts under the enumeration made under Senate Joint Resolution No. 35, and approved February 8, 1901, in pursuance of Article 2, Section 4, of the Constitution."

Now that the contents of the Redistricting Bill had been disclosed, a violent objection was voiced by a strong Republican Journal[74] which denounced the bill as "An Iniquitous Redistricting Bill," affording evidence that "the State is still dominated by a despotic oligarchy that calls itself the Democratic Party." Notwithstanding severe criticism, the Redistricting Committee introduced its apportionment bill three days after the reconvening of the Legislature.[75]

[fol. 188] After considerable seesawing back and forth, plus various and sundry proposed amendments, the Redistricting Bill as substantially drafted by the Redistricting Committee was passed in the Senate[76] on March 29 by a vote of 29 to 3. On April 2, Representative Austin Peay called for the previous question which was sustained by a vote of 61 to

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[73] *Nashville American*, March 11, 1901.

[74] *Knoxville Journal and Tribune*, March 12, 1901.

[75] House Journal, 1901, 358.

[76] *Senate Journal*, 1901, 422.

29. Thereupon, the bill was placed on third and final reading and was passed in the House[77] by a vote of 66 to 23. The enactment of this reapportionment measure marked the last law thus far passed by a Tennessee Legislature insofar as *legislative apportionment* is concerned. In marked contrast, *Congressional* reapportionment laws have been enacted at each decennial period up to and including 1951, with the exception of 1911.

Violent objections to the law were registered not only by newspapers but by various members of the Legislature itself. Representative John T. Raulston of Marion County, Chairman of the Republican House Caucus, filed a lengthy protest against the passage of the Redistricting Bill, said protest covering fifteen printed pages in the official *House Journal.*[78] Some six or eight additional Representatives went "on record" regarding their votes on said bill. If these protests be true, there can be no doubt but that the Redistricting Bill was discussed and considered by a caucus of the Democratic members of the Legislature prior to the final vote on its passage. For example, Representative John P. Murphy stated in his protest that

> "I vote aye only because the bill has received the endorsement of the Democratic caucus."

Representative Gilmer P. Smith of Shelby County declared that he supported the Bill solely upon the ground that he had participated in "two Democratic causes and thereby bound myself to abide the decision of a majority in those two caucases."[80]

[fol. 189] Two Senators, H. M. Gamble of Blount County and L. H. Lasater of McMinn County, filed also a fifteen page protest which was recorded in the official *Senate Journal.*[81] This protest is practically a *verbatim* copy of the pro-

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[77] *House Journal,* 1901, 581.

[78] *Ibid.,* 583-597.

[79] *Ibid.,* 582.

[80] *Ibid.,* 583.

[81] *Senate Journal,* 1901, 423-437.

test filed in the *House Journal*, with a preamble however alleging that:

1. No Republican member of either the House or the Senate was appointed on the Redistricting Committee.
2. The Republican minority was kept in ignorance of the action of the Redistricting Committee.
3. Newspaper reports constituted the only source of their information as to the probable action and recommendations of the Redistricting Committee.
4. "It is a fact that said committee had no figures showing the qualified voters of the State on which to base their said apportionment. Nor has said committee made any report to either House of the General Assembly showing any enumeration of voters, or in fact any basis whatever for their said apportionment bill. . . . "
5. "We charge that the Reapportionment Bill agreed upon and reported by the committee is based upon the census bulletins of the population of the State as announced by the Census Bureau at Washington." [82]

[fol. 190] Since 1901, there has been no reapportionment of legislative seats in the General Assembly. On the other hand, *Congressional* reapportionment has been made every decennial year since 1871, with the exception of 1911, and 1921. Inasmuch as the Federal Census of 1910 indicated that Tennessee would experience no change in the number of her Congressmen, perhaps that accounted for the fact that no Congressional reapportionment law was enacted by the Tennessee Legislature in 1911. It is true, however, that a special session of the Legislature had to be called in 1882 to enact a law governing Congressional reapportionment, inasmuch as the General Assembly had failed to enact such law in 1881. All along, the legislative *Journals* disclose that *legislative* reapportionment has generally presented more difficulty than *Congressional* reapportionment, although the

[82] *Ibid.*, 423-424.

latter issue has, at times, provoked spirited discussion and considerable "fireworks."

According to the calendar and the Tennessee Constitutional mandate, 1911 was "reapportionment year." On January 18, 1911, out-going Governor Malcolm R. Patterson in his parting Message to the Legislature made a brief reference to reapportionment, to-wit:

> "I favor and recommend a just and fair redistricting bill which will represent the will of the people and equally protect the rights of both political parties." [83]

The in-coming Governor, Ben W. Hooper, transmitted his main Message[84] to the Legislature on February 1, 1911, consisting of twenty-three pages in the legislative *Journals*. Neither in this nor in any other Message did Governor Hooper make any mention of reapportionment to the fifty-seventh General Assembly. This General Assembly, however, did not ignore altogether its responsibility in regard to reapportionment as being on its agenda.

[fol. 191] Five reapportionment bills, dealing with both legislative and congressional reapportionment, were introduced in the House, their respective numbers being House Bills No. 153, 967, 968, 1033, and 1034.[85] Two reapportionment bills, No. 800 and 801, were introduced in the Senate.[86] Each of the above bills, on second reading, was referred to the Redistricting Committee which, in turn, reported each bill "without recommendation." This action by the Redistricting Committee served "to chloroform" all the redistricting bills into oblivion, as no further action was taken by either branch of the Legislature. Result: no reapportionment law affecting either legislative or congressional reapportionment was passed by the 1911 General

[83] *Senate Journal*, 1911, 100.
House Journal, 1911, 74.

[84] *Senate Journal*, 1911, 149-171.
House Journal, 1911, 199-221.

[85] *House Journal*, 1911, 1295, 1333, and 1334.

[86] *Senate Journal*, 1911, 1081.

Assembly. The adoption of Senate Joint Resolution[87] No. 60, calling upon the Redistricting Committee to utilize the Federal Census of 1910 as a basis for taking an enumeration of the qualified voters, proved to be only a species of "window dressing," inasmuch as nothing appears to have been done in the premises regarding their assigned directive. [fol. 192] In his major Message[88] to the Fifty-Eighth General Assembly, Governor Ben W. Hooper made no reference to reapportionment. In a special Message,[89] on February 10, 1913, Governor Hooper devoted twenty-seven pages to the question of *legislative* apportionment. At the time of the transmission of this special Message there was a legislative apportionment bill pending before the General Assembly. Governor Hooper incorporated in his Message twenty-three pages of figures showing the population of Tennessee, by counties, according to the Federal Census of 1910. Next, he took up the existing Senatorial Districts and gave the populations of each. A similar classification of counties comprising the Floterial Districts was also presented. From these figures Governor Hooper maintained that there was "gross injustice and inequality of the present apportionment." Such inequality, he declared, is inherent in the arrangement of the counties in the Act of 1901, and part of it is due to the changes in population in the last decade."

Out of a total of 2,395 bills introduced in the 1913 General Assembly, only one bill related to legislative reapportionment. That one bill[90] was House Bill No. 227, introduced by Representative Anderson D. Albright of Knox County, and was the "pending bill" referred to by Governor Hooper. The bill passed second reading in the House on January 30,

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[87] *Acts of Tennessee*, 1911, 315.

[88] *Senate Journal*, 1913, 51-78.
House Journal, 1913, 56-83.

[89] *Senate Journal*, 1913, 245-271.
House Journal, 1913, 265-291.

[90] The original bill is missing in the State Archives; consequently its provisions are unknown.

1913, and was referred to the Committee on Redistricting.[91] The Senate Redistricting Committee was composed of Senators John C. Crawford, Lewis Pope, Dorsey B. Thomas, Baty Cecil, Ernest C. Smith, Eugene Blakemore, Norman B. Morrell, S. H. Williams, Hoyt T. Stewart, and James Brett, Jr.[92]

[fol. 193] The legislative Journals indicate that the reapportionment bill never received any further consideration by the General Assembly.[93]

The 1913 Legislature was called into two extra sessions by Governor Hooper, but no legislative action was taken in regard to reapportionment.

Insofar as reapportionment was concerned, the year 1915 was an "off" year. Nevertheless, Governor Hooper in his basic Message to the 1915 General Assembly referred to the failure of the Legislature to pass any apportionment law[94] in either 1911 or 1913. His recommendation was that

> "The present General Assembly ought to enact a new legislative apportionment, based alone upon geography and population, and ignoring considerations of partisan politics." [95]

Two weeks before *sine die* adjournment, Senator T. J. Hoskins, a locomotive engineer and a Republican of Knoxville, introduced Senate Bill No. 1106, "to apportion counties into representative and senatorial districts.[96] The only

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[91] *House Journal*, 1913, 189.

[92] *Senate Journal*, 1913, 164.

[93] *Note:* In a telephone conversation, on October 27, 1959, with the sole surviving member of the 1913 Senate Redistricting Committee, that member was asked what action was taken by the Redistricting Committee on the Redistricting Bill. His recollection seemed to be crystal clear. His reply to the query was: "We chloroformed it and put it to sleep."

R. H. W.

[94] *Senate Journal*, 1915, 43.

[95] *Ibid.*, 44.

[96] *Ibid.*, 781.

other action indicated in the *Senate Journal* is as follows: "Held on the Clerk's desk."

[fol. 194] In the 1917 Session of the Legislature, without any recommendation from the incumbent Governor, Tom C. Rye, a legislative reapportionment bill No. 278 was introduced in the Senate.[97] The bill was referred to the Judiciary Committee and failed to be recommended for passage. This seems to have ended the matter, for nothing further is found in the legislative *Journals* concerning its fate.

In the 1919 legislative session, neither the Governor nor the General Assembly gave any attention to reapportionment.

In the 1921 session, which normally was "reapportionment year", three reapportionment bills, No. 12, 942, and 943, were introduced in the House. All three bills were passed on second reading and then referred to the Redistricting Committee.[98] So far as the official record discloses, this was the last ever heard of these bills. No Congressional reapportionment law was enacted, even though it was a decennial year. The Legislature followed a precedent established in 1911 when Congressional Apportionment was by-passed. In each instance, in 1911 and 1921, the Federal Census indicated that there would be no change in the number of Congressmen alloted to Tennessee. Upon that basis, the Legislature apparently decided "to let sleeping dogs lie."

[fol. 195] Legislative Session, 1923

Neither the out-going nor in-coming Governor mentioned reapportionment in any of their respective Messages. No reapportionment bill was introduced in either branch of the General Assembly, nor was any Resolution introduced on the subject.

Legislative Session, 1925

Ditto.

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[97] *Senate Journal*, 1917, 409.

[98] *House Journal*, 1921, 32, 637.

LEGISLATIVE SESSION, 1927.

Governor Austin Peay made no reference to reapportionment in any of his Messages. However, on March 31, 1927, Representative A. R. Brown, of Unicoi County, introduced House Bill[99] No. 887 "To redistrict Tennessee." The bill passed second reading and was then referred to the Redistricting Committee.[100] Said Committee recommended the above bill "for rejection." [101] On April 11, 1927, the bill was re-referred to the Redistricting Committee[102] and no further action is indicated in the official *Journals*.

LEGISLATIVE SESSION, 1929.

On February 11, 1929, Representatives Louis Ferguson of Coffee County and J. S. Riley of Lake County introduced a bill[103] "to apportion the several counties of Tennessee into Senatorial and Representative Districts." Five hundred copies of the bill were ordered printed.[104] Next, the bill was sent to the Redistricting Committee.[105] On March 19, Representative Walter Haynes of Franklin County moved that the bill be recalled from the Redistricting Committee.

[fol. 196] An effort to table his motion failed by one vote.[106] A few days later, Mr. Haynes moved the previous question to postpone action on the bill indefinitely, his motion being carried by an unrecorded vote. Thereupon, Mr. Haynes moved a reconsideration of the action just taken, whereupon Representative McReynolds of Montgomery County moved successfully that the Haynes motion go to the table.[107] This ended the matter for that session.

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[99] *House Journal*, 1927, 667.

[100] *Ibid.*, 733.

[101] *Ibid.*, 922.

[102] *Ibid.*, 1005.

[103] *House Journal*, 421.

[104] *Ibid.*, 436.

[105] *Ibid.*, 443.

[106] *Ibid.*, 719.

[107] *Ibid.*, 739-740.

LEGISLATIVE SESSION, 1931

No mention of reapportionment was made by the Governor in any of his Messages to the Legislature, even though it was a decennial or "reapportionment year." Two bills *re* Congressional reapportionment were introduced, Senate Bill No. 429 by Senators W. W. Craig and Leighton Ewell,[108] and House Bill No. 634 by representative James Cummings.[109] After several unsuccessful attempts to amend the Cummings bill, the original bill was passed[110] by a vote of 78 to 8. The above House Bill No. 634 was substituted for Senate Bill No. 482 on same subject, and passed[111] by a vote of 30 to 0. Thus, a Congressional reapportionment law[112] had been enacted.

On May 28, five Republican Senators introduced a bill[113] providing for legislative reapportionment. The bill was referred to the Judiciary Committee[114] and no further notice of the bill appears in the legislative *Journals*.

[fol. 197] LEGISLATIVE SESSION, 1933.

No mention of reapportionment by either the Governor or the General Assembly.

LEGISLATIVE SESSION, 1935.

There was no mention of reapportionment in any of the Governor's Messages.

On April 5, Senator J. T. Trotter of Blount County introduced House Bill No. 818 that dealt with *legislative* apportionment.[115] On second reading the bill was referred to the

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[108] *Senate Journal*, 1931, 350.

[109] *House Journal*, 1931, 499.

[110] *Ibid.*, 549.

[111] *Senate Journal*, 1931, 435.

[112] *Acts of Tennessee*, 1931, Ch. 20.

[113] *Senate Journal*, 1931, 708.

[114] *Ibid.*, 727.

[115] *Senate Journal*, 1935, 731.

Steering Committee.[116] Nothing further was heard of said bill, insofar as the official *Journals* disclose. Like countless other bills, this bill never got placed on the calendar.

At an extra session, July 15, 1935-August 3, 1935, no action was taken *re* reapportionment. Three hundred and thirteen items were specified in the Governor's Proclamation,[117] but no mention of reapportionment.

For the first time since the adoption of the 1870 Constitution, the Seventieth General Assembly was called into extra session *prior to the convening of the regular session.* An act was enacted, that of complying with the provisions of a Federal Act relating to Old Age Benefits,[118] and one other act providing for the expenses of said session. Nothing concerning reapportionment was done, by either the Governor or the General Assembly.

[fol. 198] Legislative Session (Regular Session) 1937

No attention was paid to reapportionment by either the Governor or the General Assembly.

Second Extra Session, 1937.
Nothing *re* reapportionment.

Third Extra Session, 1937.
Nothing *re* reapportionment.

Legislative Session, 1939.

Ditto.

Legislative Session, 1941.

In his Message of January 7, 1941, Governor Prentice Cooper had this to say:[119]

"I earnestly hope that the Congressman taken away from Tennessee two years ago will be restored. If Tennessee is given the new Congressman, I would favor

[116] *Ibid.*, 780.

[117] *Senate Journal* (1st Extra Session)—1935, 4-39.

[118] *Senate Journal* (1st Extra Session)—1936, 1-6.

[119] *Senate Journal*, 1941, 49.

the restoration of the districts as they existed when Tennessee had its ten Congressmen rather than have a Congressman-at-large."

On February 5, 1941, Mr. Speaker O'Dell and Representative J. B. Ragon, Jr., of Chattanooga, introduced House Bill No. 700

"To redistrict the State, as to Congressional Districts"[120]

When the bill came up on third reading, three proposed amendments were tabled, whereupon the bill was passed[121] in the House by a vote of 75 to 10. The bill was then passed[122] in the Senate by a vote of 28 to 2. A Congressional Reapportionment Law[123] had been enacted.

No bill to provide for *legislative* reapportionment was introduced in either branch of the General Assembly during this session.

Legislative Session, 1943 Nothing whatsover *re* Reapportionment.

[fol. 199] Legislative Session (Extra Session) 1944

Nothing—*Re* Reapportionment

Legislative Session, 1945

Governor Cooper made no reference to reapportionment in his Message to the Generay Assembly, and no bill providing for Statewide reapportionment was introduced in either branch of the Legislature. There were, however, two bills introduced in the Senate providing for a partial reapportionment of certain Congressional Districts. Each bill[124] sought to amend the State wide Congressional Reappor-

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[120] *House Journal*, 1941, 562.

[121] *Ibid.*, 774.

[122] *Senate Journal*, 1941, 619.

[123] *Acts of Tennessee*, 1941, Chapter 95.

[124] *Senate Journal*, 1945, 255 and 498.

tionment law of 1941. Senator Arnold's bill added the counties of Scott and Morgan to the Second Congressional District and eliminated them from the Fourth Congressional District.[125] Senator Cantrell's bill moved the counties of McMinn and Monroe from the Second to the Third Congressional District.[126] This unusual shift of four counties from one Congressional District to another constituted the only reapportionment legislation on the Seventy Fourth Session of the General Assembly.

[fol. 200] LEGISLATIVE SESSION, 1947

Nothing *re* Reapportionment

LEGISLATIVE SESSION, 1949

Ditto.

LEGISLATIVE SESSION, 1951

On January 22, 1951, Governor Gordon Browning transmitted the following Message[127] to the Legislature:

"TO THE SPEAKERS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF TENNESSEE

I have the honor to submit herewith Certificate from Honorable Ralph R. Roberts, Clerk of the House of Representatives of the United States Congress. This Certificate showing that from and after the present term of Congress Tennessee will be entitled to Nine Representatives in the House there instead of the Ten now serving. I recommend that the Legislature take proper steps to conform to this condition by arranging Nine Congressional Districts in Tennessee instead of the Ten now existing.

Respectfully submitted,

GORDON BROWNING
Governor.

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[125] *Acts of Tennessee*, 1945, Chapter 51.

[126] *Ibid.*, Chapter 59.

[127] *Senate Journal*, 1951, 182-3.

Altogether, five reapportionment bills were introduced, two in the House and three in the Senate. Senate Bills Nos. 690 and 922 dealt with legislative reapportionment.[128] The other Senate Bill No. 988 dealt with Congressional reapportionment. Senate Bill No. 690 was referred to the committee on Judiciary,[129] and Senate Bill No. 922 was referred to the Steering Committee.[130] The Senate Journal discloses no [fol. 201] further action on either bill. Senate Bill No. 988, dealing with Congressional reapportionment, was likewise sent to the Steering Committee from which it never emerged.[131]

House Bill No. 987, dealing with Congressional reapportionment only, was referred to the Committee on Redistricting.[132] No further action on this bill is indicated in the legislative *Journals*. House Bill No. 1144, also dealing with Congressional reapportionment, seems to have the "green light", but the bill encountered various amendments, delaying tactics, *et cetera*. Eventually, the amended bill was passed[133] in the House by a vote of 81 to 9., and in the Senate[134] by a vote of 27 to 4. A congressional reapportionment law had been enacted,[135] but no legislative apportionment law was passed.

[fol. 202] LEGISLATIVE SESSION, 1953

The Governor made no reference to reapportionment in any Message to the General Assembly. Six Bills, three in the Senate and three in the House, were introduced. Each bill dealt with redistricting the State as regards legislative seats in the General Assembly. The Senate Bills were Nos. 69, 70 and 71. The House Bills were Nos. 120, 123, and 125.

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[128] *Senate Journal*, 1951, 575 and 812.

[129] *Ibid.*, 621.

[130] *Ibid.*, 867.

[131] *Ibid.*, 990.

[132] *House Journal*, 1951, 1033.

[133] *Ibid.*, 1490.

[134] *Senate Journal*, 1951, 1267.

[135] *Acts of Tennessee*, 1951, Chapter 251.

The Three Senate bills passed second reading and were ordered "held on the desk".[136] A few days later, said bills were, after considerable delay, reported[138] out of the Committee "without recommendation." This marked the demise of all Senate Bills *re* reapportionment.

All three House Bills were routinely assigned to the Redistricting Committee.[139] For some undisclosed reason, House Bill No. 120 was recalled from above Committee and referred to the Elections Committee,[140] which a bit later reported bill "without recommendation." The Redistricting Committee disposed of the other two bills by same procedure, "without recommendation." And so, all six reapportionment bills went down the drain.

[fol. 203] LEGISLATIVE SESSION, 1955

In a Message embracing seventy-four printed pages in the official legislative Journals, Governor Frank G. Clement made this comment on Reapportionment:[141]

> "Every elected representative of the people of the State of Tennessee recognizes the acute problem of reapportionment of representation. Our Constitution provides that the State shall be redistricted for the purpose of determining proper representation every ten years.
>
> This provision of our basic law has not been obeyed for nearly 50 years—since, in fact, the year 1907, when the last reapportionment was accomplished. The districts set up at that time are still in effect, except for minor changes not following any logical pattern, and, in

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[136] *Senate Journal*, 153, 195.

[137] *Ibid.*, 205.

[138] *Ibid.*, 768 and 1213.

[139] *House Journal*, 1953, 220-221.

[140] *Ibid.*, 262.
Senate Journal, 1955, 149.

[141] *House Journal*, 1955, 135.
Note: The year 1907 is a typographical error. The year is 1901.

some cases, there are glaring inequalities . . . It is my recommendation that there be appointed a special joint committee to study the problem of reapportionment, its inequalities and its ramifications, this special committee to be instructed to report back to the next Assembly its findings and recommended course of action. I urge that you give this matter your serious consideration."

Two House Bills pertaining to legislative apportionment, No. 9 and No. 46, were introduced early in the session. Bill No. 9 did not make much progress, being withdrawn early from the House.[142] Upon second reading House Bill No. 46 was rejected[143] by a vote of 62 to 33. A motion to reconsider was sent to the table, and this ended the matter.

[fol. 204] House Resolution No. 62, relative to having the Legislative Council make a study of reapportionment, failed to obtain a favorable vote for a suspension of the rules for immediate consideration of the Resolution.[144] This being the final day of the session, the foregoing action of the House ended the matter.

Senate Joint Resolution No. 17 relative to the appointment of a Committee to investigate Reapportionment was adopted[145] by the Senate on January 25, 1955. According to the Senate Journal, the above Resolution was tabled by the House.[146]

Legislative Session, 1957

In his Message to the General Assembly on January 16, Governor Clement renewed his recommendation of two years ago that

"You either reapportion on a fair basis or at least that you authorize a study of the problem by the Legislative

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[142] *House Journal*, 1955, 68.

[143] *Ibid.*, 181-183.

[144] *Ibid.*, 1868-9.

[145] *Senate Journal*, 1955, 224.

[146] *Ibid.*

Council, the results of this study to be made available to your successors in the Eighty-First General Assembly" [147]

On the second day of the session, Representative Paul Graham of Marion County introduced House Bill No. 6 "to provide Reapportionment of Representatives.[148] The bill was finally placed on the calendar by the Steering Committee and, on March 13, action on the bill was postponed indefinitely by a vote of 54 to 41.[149]

[fol. 205] Senate Joint Resolution No. 56 relative "to study reapportionment" was referred to the "Steering Committee" on March 17, and nothing more was heard of it.[150]

House Joint Resolution No. 26 "relative to a study of reapportionment by the Legislative Council" was placed on the calendar by the Steering Committee, but "further action be postponed indefinitely" was the verdict in the House by a vote of 48 to 44.[151] No sort of reapportionment legislation was enacted by the 1957 general assembly.

TENNESSEE LEGISLATIVE BILLS, 1871-1957

Year	*Number of bills Introduced*	
	Senate	*House*
1871	283	681
1872 (Extra)	32	53
1873	311	510
1875	289	571
1877	327	723
1879	746	745
1879 (Extra)	12	8

[147] *Senate Journal*, 1957, 95.

[148] *House Journal*, 1957, 32.

[149] *Ibid.*, 1202.

[150] *Ibid.*, 1325.

[151] *Ibid.*, 1252.

TENNESSEE LEGISLATIVE BILLS, 1871-1957 (Continued)

Year	Number of bills Introduced	
	Senate	House
1881	363	691
1881 (Extra)	15	14
1882 (Extra)	11	90
[fol. 206]		
1882 (2nd Extra)	17	21
1882 (3rd Extra)	9	13
1883	441	824
1885	729	457
1885 (Extra)	60	71
1887	497	829
1889	518	826
1890 (1st Extra)	61	75
1890 (2nd Extra)	2	3
1891	488	725
1891 (Extra)	68	82
1893	528	695
1895	502	707
1895 (1st Extra)	8	4
1896 (2nd Extra)	6	14
1897	601	808
1898 (Extra)	27	35
1899	698	1023
1901	662	1120
1903	757	1089
1905	713	1028
1907	898	1096
1909	873	1087
1911	1066	1216

[fol. 207]

TENNESSEE LEGISLATIVE BILLS, 1871-1957 (Continued)

Year	Number of bills Introduced	
	Senate	House
1913	1090	1305
1913 (1st Extra)	249	277
1913 (2nd Extra)	8	8
1915	1422	1632
1916 (Extra)	1	1
1917	1336	1622
1919	1237	1335
1920 (Extra)	156	135
1921	1471	1779
1923	985	1255
1925	1097	1365
1927	992	1401
1929	1482	1494
1929 (Extra)	112	125
1931	1396	1565
1931 (1st Extra)	5	6
1931 (2nd Extra)	222	251
1933	1173	1727
1935	1299	1660
1935 (Extra)	250	303
1936 (Extra)	2	2
1937	1337	1731
1937 (2nd Extra)	69	87
1937 (3rd Extra)	70	85

[fol. 208]

1939	1169	1544
1941	881	1151

TENNESSEE LEGISLATIVE BILLS, 1871-1957 (Continued)

Year	Number of bills Introduced Senate	House
1943	834	978
1944 (Extra)	5	5
1945	904	1141
1947	1302	1472
1949	1382	1768
1951	1243	1447
1953	1101	1351
1955	968	1123
1957	918	1144
1959*		
TOTAL	40,812	52,331

GRAND TOTAL: 93,143

This documented survey of Reapportionment in Tennessee, from 1870 to 1957 inclusive, is based almost entirely upon official sources, namely, the legislative Journals and the session Laws. In addition to the above sources, the Resolutions,—House, Senate, House Joint and Senate Joint Resolutions—were examined and all the Messages of the various Governors were scanned. It was absolutely necessary *to scan the titles of all the bills introduced!* You never knew when you would run across a reapportionment bill.

* Not yet off the press.

[fol. 210]

EXHIBIT 3 TO INTERVENING COMPLAINT

CHAPTER NO. 14

HOUSE BILL No. 123

(By James L. Bomar, James H. Cummings and W. L. Barry)

A BILL to be entitled: AN ACT to provide for the operation of the educational system of the State and its subdivisions, including, but not limited to, capital outlay, textbooks, Educational Grants-in-Aid, and Tennessee Teachers' Retirement System, the Tennessee State Library and Archives, the Tennessee Educational Television Commission scholarships for graduates of the Tennessee School for the Blind, the Tennessee School for the Deaf, and the Tennessee Preparatory School, pensions for aged teachers, and retirement systems of State schools; to provide for the training of exceptional children; to make appropriations for the purposes of this Act and to regulate the expenditure of such appropriations; to confer powers on the officers, boards, institutions and agencies of such school systems for the administration of this Act; and to repeal Chapter 53, Public Acts of 1957, the caption of which is as follows: "AN ACT to provide for the operation of the educational system of the State and its subdivisions, including, but not limited to, capital outlay, text- [fol. 211] books, the Tennessee Teachers' Retirement System, scholarships for graduates of the Tennessee School for the Blind and the Tennessee School for the Deaf, pensions for aged teachers, and retirement systems of State schools; to provide for the training of exceptional children; to make appropriations for the purposes of this Act and to regulate the expenditure of such appropriations; to confer powers on the officers, boards, institutions and agencies of such school systems for the administration of this Act: and to repeal Chapter 136, Public Acts of 1955, the caption of which is as follows: 'AN ACT to provide for the operation of the educational system of the State and its subdivi-

sions, including, but not limited to, capital outlay, textbooks, the Tennessee Teachers' Retirement System, scholarships for graduates of the Tennessee School for the Blind and the Tennessee School for the Deaf, pensions for aged teachers, and retirement systems of State schools; to provide for the training of exceptional children; to make appropriations for the purposes of this Act and to regulate the expenditure of such apropriations; to confer powers on the officers, boards, institutions and agencies of such school systems for the administration of this Act; to repeal Chapter 70, Public Acts of 1953, the caption of which is as follows: 'AN ACT to provide for the operation of the educational system of the State, including capital outlay, the Tennessee Teachers' Retirement System, scholarships for graduates of the Tennessee School for the Blind and the Tennessee School for the Deaf, pensions for aged teachers, and School for the Deaf retirement pensions, by making appropriations therefor, by regulating the expenditure of such appropriations and by providing for the powers of the institutions and agencies in such system; and for imposing certain duties upon the State Board of Education with reference to exceptional children; and to repeal Chapter 9, Public Acts of 1949, the caption of which is as follows: 'AN ACT to provide for the operation of the educational system of the State, including capital outlay, by making appropriations therefor by regulating the expenditure of such appropriations and by providing for the powers of the institutions and agencies in such system; and to repeal Chapter 179, Public Acts of 1951, the caption of which is as follows: 'AN ACT to provide for the education of exceptional children in counties, cities and special school districts; to define the exceptional child; to establish the age for which the State shall provide educational services; and for the promotion, operation and supervision of special courses of instruction for the exceptional child' and to repeal Chapter 35, Public Acts of 1953, the caption of which is as follows: 'AN ACT to appropriate funds to be distributed to counties, cities and special school districts both equalizing and non-

equalizing for the purchase of textbooks and the administration of the textbook program for grades one through twelve for the public schools, and to use any excess funds distributed for public school purposes; to provide for the issuance of bonds by the State of Tennessee acting by resolution of the State Funding Board [fol. 212] for said purpose; and to provide regulations governing the disbursement and the use of said funds.'"

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That there is hereby appropriated from the State Treasury for the fiscal year beginning July 1, 1959, and for the fiscal year beginning July 1, 1960, and annually thereafter, the amounts herein set forth for the various educational items and services as indicated and described herein.

The appropriations herein made are in lieu of all appropriations, continuing or contingent, made by statutes enacted prior to the effective date hereof, except that in all cases where the proceeds of certain tax levies, either ad valorem or privilege, have heretofore been allocated, or shall be allocated by statute to educational purposes, this Act shall not be construed as in any wise amending such allocations, but on the contrary such allocations shall continue in full force and effect as completely as though embraced herein; and the proceeds of such tax levies shall be applied, first, to the payment of the sums appropriated herein before any amount be withdrawn from the general fund of the State for these purposes.

SECTION 2. *Be it further enacted,* That for the purpose of the current operation and maintenance of the public schools of this State, grades one through twelve, there is hereby appropriated for the fiscal year beginning July 1, 1959, Eighty-four Million, Three Hundred Thousand ($84,300,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter, there is hereby appropriated, subject to the provisions of Section 39 of this Act, Eighty-nine Million, Eight Hundred Thousand ($89,800,000.00) Dollars, out of the treasury of the State,

[fol. 213] which sums shall be distributed upon the conditions hereinafter prescribed.

SECTION 3. *Be it further enacted,* That for the purpose of distributing the funds appropriated under Section 2 of this Act, counties shall be divided into two classes: (1) equalizing counties, and (2) non-equalizing counties. Equalizing counties shall be construed to mean those counties that meet the requirements and conditions hereinafter prescribed in this Act for equalizing counties. Distribution of funds shall be made to equalizing counties as set forth in Sections 4 through 6 of this Act. Funds distributed to equalizing counties from the appropriations in Section 2 of this Act shall be known as equalizing funds. Non-equalizing counties shall be construed to mean those counties which elect not to become equalizing counties, or which fail to meet the requirements for equalizing counties. Distribution of funds shall be made to non-equalizing counties as set forth in Section 7 of this Act. Funds distributed to non-equalizing counties from the appropriations in Section 2 of this Act shall be known as non-equalizing funds. It shall be assumed that all counties shall remain in the same category in which they were the previous fiscal year unless they elect to change under the provisions of this Act, and so notify the State Commissioner of Education in writing on or before August 1 of the current school year. In order for a city or special district to qualify for equalizing funds, the county in which the city or special school district is located shall first qualify for and elect to participate in equalizing funds.

EQUALIZING SYSTEMS

SECTION 4. *Be it further enacted,* That there shall be a minimum foundation school program for current opera-
[fol. 214] tion and maintenance of the public schools of this State, grades one through twelve, and the elements and the determination of the cost of the services of the said minimum foundation program shall be as follows:

(1) *Salaries*

(a) The salary of a county superintendent shall be included in the minimum foundation school program of an

equalizing county and determined on the basis of a salary schedule prescribed by the State Board of Education and approved by the State Commissioner of Education. In prescribing the salary schedule, the State Board of Education shall take into consideration the training and experience of the superintendent and the average daily attendance of the system of which he is superintendent.

There shall be included in the minimum foundation school program of an equalizing city, or special school district the salary of the superintendent of schools of such city, or special school district, if not otherwise provided, for the school year 1959-60, an amount not to exceed Nineteen Hundred Thirty-five ($1935.00) Dollars, and for the school year 1960-61 an amount not to exceed Two Thousand Thirty-five ($2,035.00) Dollars, according to a schedule which shall be established by the State Board of Education and approved by the State Commissioner of Education.

(b) System-wide positions allowed and used, together with the cost of salaries thereof, other than the position and salary of the superintendent of schools for which provision is made in subsection (1) (a) of this section, shall be allowed in the minimum foundation school program of an [fol. 215] equalizing county, city, or special school district in accordance with employment standards, salary schedules, system-wide position teacher ratios and the maximum and minimum number per school system of such system-wide positions as shall be established by the State Board of Education and approved by the State Commissioner of Education. Any system-wide position, together with the salary thereof, which was in existence for the school year 1958-59 and for which provision is not otherwise made in accordance with the provisions of this subsection, may be continued at the discretion of the State Commissioner of Education for the biennium 1959-61. In order for any system-wide position, together with the salary therefor, as authorized hereinbefore in this paragraph, to be included in the maximum foundation school program of an equalizing county, city, or special school district, the person filling such system-wide position shall be recommended by the local superintendent of schools and elected by the local board of education.

(c) The salaries as determined under the State salary schedule, as provided for in Section 10 of this Act, of such teachers and principal-teachers as shall be allowed and used under teacher-pupil ratios established by the State Board of Education and approved by the State Commissioner of Education shall be included in the minimum foundation school program of an equalizing county, city, or special school district. The aggregate annual amount to be included for the salaries of teachers and principal-teachers in each equalizing county, city, or special school district, shall be calculated by multiplying the average annual salary of teachers and principal-teachers of each equalizing county, city, or special school district under the State salary schedule as provided for in Section 10 of this Act, by the [fol. 216] number of teacher and principal-teacher positions allowed and used in the minimum foundation school programs, in keeping with the teacher-pupil ratios fixed by the State Board of Education; provided that the average annual salary of teachers and principal-teachers of each school system shall be determined by dividing the aggregate annual salaries based on the State salary schedule as herein provided, of teachers and principal-teachers of a school system for the first day of the third month of the school term by the total number of teacher and principal-teacher positions of that school system for the first day of the third month of the school term; provided further that any county, city, or special school district board of education may designate the teacher and principal-teacher positions used in computing the average annual salary and shall certify to the State Commissioner of Education the persons filling such positions, on the first day of the third month of the school term; provided that if the number of teacher and principal-teacher positions thus designated is less than the number that would otherwise be allowed and used in the minimum foundation school program under the rules and regulations of the State Board of Education, only the number of positions so designated by a county, city, or special school district board of education shall be included in that system's minimum foundation program.

The information on which the average annual salary of teachers and principal-teachers is determined shall be re-

ported to the State Commissioner of Education on or before January 1 of the current school year, on forms prescribed by him.

(d) One clerical position and the salary therefor shall be allowed in the minimum foundation school program of an equalizing county for the office of the county superin- [fol. 217] tendent, provided that the person employed in such position shall be recommended by the local superintendent of schools and elected by the local board of education. The State Board of Education shall formulate rules and regulations, including employment standards and a salary schedule, for the clerical position authorized in this subsection. There is hereby allocated One Hundred Four Thousand ($104,000.00) Dollars, per annum, of the appropriation made in Section 2 of this Act for salary supplements of school clerical employees and/or per capita amounts for clerical services in both equalizing and non-equalizing school systems; provided that such supplements and/or per capita amounts shall be allowed in the minimum foundation school program of an equalizing county, city, or special school district under the rules and regulations of the State Board of Education and approved by the State Commissioner of Education.

(2) *Transportation*

Pupil transportation services shall be defined by the State Board of Education and approved by the State Commissioner of Education, and the cost thereof shall be allowed in the annual minimum foundation school program for current operation and maintenance purposes of equalizing counties and shall be determined in the following manner:

(a) For the fiscal year beginning July 1, 1959, there shall be made available, in the aggregate minimum foundation school programs of equalizing counties (including both State and local funds), for the aggregate state-wide cost of pupil transportation services in equalizing counties the sum of Eight Million, One Hundred Two Thousand ($8,102,000.00) Dollars, and for each fiscal year thereafter [fol. 218] there shall be made available in the aggregate

minimum foundation school program of equalizing counties (including both State and local funds), for the aggregate state-wide cost of pupil transportation services in equalizing counties the sum of Eight Million, Two Hundred Thirty-four Thousand ($8,234,000.00) Dollars; provided that the State Commissioner of Education shall have the authority to increase or decrease the aggregate state-wide amount for pupil transportation services in equalizing counties and the aggregate annual amount allocated for the cost of pupil transportation services in Section 7 of this Act to non-equalizing counties, to the end that a unified transportation program may be effectuated.

(b) There shall be allowed in the minimum foundation school program for each equalizing county for the cost of pupil transportation purposes the following:

((1)) Ten ($10.00) Dollars shall be allowed for each pupil transported during the preceding school year, according to the rules and regulations of the State Board of Education and approved by the State Commissioner of Education.

((2)) The amount remaining out of the total allocated for pupil transportation services in equalizing counties, after the allowance in ((1)) above has been deducted, shall be allowed to the various equalizing counties, according to the ratio of the average rural population per square mile in the State to the average rural population per square mile in the county.

The cost of pupil transportation services in a county shall be determined by adding together the allowances made in such county under ((1)) and ((2)) above. In [fol. 219] making the allowance herein provided for pupil transportation, only the average daily attendance of pupils transported at public expense who live one and one-half (1½) miles or more from the school to which they are assigned by the respective board of education and in which they are enrolled shall be taken into account; provided, however, that the county board of education may in its discretion provide, at local expense, pupil transportation facilities for children who live less than one and one-half (1½) miles from the school to which they are assigned by

the respective board of education and in which they are enrolled; provided further that State transportation funds may be distributed to counties under the rules and regulations of the State Board of Education and approved by the State Commissioner of Education for the transportation of physically handicapped pupils who are transported less than one and one-half (1½) miles.

It is further provided that the amount of any funds allowed in the minimum foundation school program of an equalizing county for transportation services which are unused and unobligated for pupil transportation services at the end of the fiscal school year shall be certified by the county superintendent of schools to the county trustee, who shall transfer such unused and unobligated funds to the "State Capital Outlay School Fund" of that county school system as provided in Section 15 of this Act.

(3) *Other Current Operating Expenses*

(a) Travel

The travel expenses of the county superintendent and members of the county board of education shall be allowed in the minimum foundation school program of an equal-
[fol. 220] izing county in the amount of Five Hundred ($500.00) Dollars, per annum. Travel expenses for personnel rendering services on a county-wide basis in system-wide positions as provided in subsection (1) (b) of this section, who in the discharge of official duties are required to travel, shall be included in the minimum foundation school program of an equalizing county for each such county-wide position on the basis of an amount of Four Hundred Fifty ($450.00) Dollars, per annum, for each such county-wide full-time position. Travel expenses for each teacher of special education who in the discharge of his official duties is required to travel, shall be allowed in the minimum foundation school program of an equalizing county on the basis of Four Hundred Fifty ($450.00) Dollars, per annum, for each full-time teaching position. Travel expenses for teachers of home-bound children shall be allowed in the minimum foundation school program of an equalizing city or special school district on the basis of an amount of Four

Hundred Fifty ($450.00) Dollars, per annum, for each full-time teaching position.

The travel allotments herein provided in this subsection, other than that of the county superintendent and members of the county board of education, shall be included only for those positions allowed and used in the minimum foundation school program, and then only in the event that the person employed in each such position shall meet the employment standards for such positions as shall be adopted by the State Board of Education and approved by the State Commissioner of Education.

Each official, including the county superintendent of schools, and employee of a board of education, who is authorized to incur travel expenses which are to be paid from [fol. 221] any public school funds, is directed and required to make out an accurate itemized statement of said expenses, showing the date and amount of each separate item and the purpose for which it was expended. The correctness of each expense account and the fact that it was actually incurred in the performance of official duties shall be certified by such official or employee. The travel expenses included in the minimum foundation school program, as authorized hereinbefore in this subsection, shall be paid by the local superintendent of schools, upon order of the local board of education, on a reimbursable basis only.

(b) *Learning and Instructional Materials and School Health Services*

A per capita amount of One and 25/100 ($1.25) Dollars based on the average daily attendance of the preceding school year of an equalizing county, city, or special school district shall be included each school year in the minimum foundation school program of such equalizing county, city, or special school district, for the purchase of learning and instructional materials and school health services, according to a plan recommended by the local superintendent of schools and approved by the local board of education of said equalizing county, city, or special school district; provided that a copy of such plan shall be filed with the State Commissioner of Education on or before September 1 of the current school year. The term "school health services"

shall be defined by the State Board of Education and approved by the State Commissioner of Education.

(c) *School Plant Operation, Maintenance Services, Fixed Charges, and Other Expenses of General Control*

[fol. 222] A per capita amount of Nine and 70/100 ($9.70) Dollars based on the average daily attendance of the preceding school year of an equalizing county, city, or special school district, shall be included each school year in the minimum foundation school program of such equalizing county, city, or special school district for the purpose of school plant operation, maintenance services, fixed charges, and other expenses of general control; provided that school plant operation, maintenance services, fixed charges, and other expenses of general control shall be defined by the State Board of Education and approved by the State Commissioner of Education.

SECTION 5. *Be it further enacted,* That in order to determine the amount of funds which each equalizing county, including the cities and special school districts therein, shall raise from local sources as its part of the minimum foundation school program in that county for current operation and maintenance purposes for the public schools, grades one through twelve, the State Commissioner of Education shall, on the basis of data available the March 1 preceding the beginning of the next biennium:

(1) Calculate, for each fiscal year of the State, for each county for the next biennium, an economic index of each county's per cent of the total taxpaying ability, other than for public utilities, of all the counties of the State, which index for each county shall consist of the sum of the following: (a) the product obtained by multiplying .105 by the county's per cent of the State total motor vehicle registration payments for the three most recent years; (b) the product obtained by multiplying .069 by the county's per cent of the State total of farm products sold according to the most recent Federal Census of Agriculture; (c) the [fol. 223] product obtained by multiplying .136 by the county's per cent of the total number of gainfully employed non-government workers in the State, according to the

most recent Federal Census; and (d) the product obtained by multiplying .690 by the county's per cent of the State total of retail sales tax collections for the three most recent years. The data for motor vehicle registration payments and retail sales tax collections shall be furnished by the State Department having charge of such data; provided that the State Board of Education is hereby authorized to make such changes in the data of motor vehicle registration payments, the number of gainfully employed non-government workers and retail sales tax collections for Anderson County as in its discretion may be necessary to assure equity.

(2) Multiply the economic index for each county as derived in accordance with subsection (1) of this section, by the aggregate of the estimated value of locally assessed property in the State, Eight Billion, Two Hundred Fifteen Million, One Hundred Fifteen Thousand ($8,215,115,000.00) Dollars. The product obtained shall be the amount of the estimated relative true value of locally assessed property of the county. To this amount shall be added the assessed valuation of public utilities for that county as set forth in the most recent Tax Aggregate Report of Tennessee with such correction as may be made, in the discretion of the State Board of Education, to reflect the property equivalent valuation represented by payments made in lieu of taxes by the Tennessee Valley Authority, distributors of T. V. A. power, or other agencies of the United States.

(3) Calculate, for each county its per cent of the total estimated value of taxable property in the State determined as in the above.

[fol. 224] (4) Multiply each county's per cent of the total estimated value of taxable property determined as in subsection (3) of this section by Eighteen Million, One Hundred Twenty Thousand ($18,120,000.00) Dollars; and the product shall constitute the amount of funds which the county, as an equalizing county, shall raise, per annum, from local sources as its share of the cost of the minimum foundation school program for current operation and maintenance of the public schools, grades one through twelve; in no event, however, shall any county which was an equalizing county

for the fiscal school year 1953-54 and which received State equalizing funds as such be required to raise during either fiscal school year of the biennium 1959-61 more money locally from all sources for school purposes than it did raise as a requirement for participation in State equalizing funds for the fiscal school year 1953-54; provided, however, that the additional amount of State funds represented by the "guarantee" as set forth hereinabove in this subsection shall be limited to the amount of such "guarantee" as calculated for the school year 1958-59.

Where a county, city, or special school district receives Federal funds by virtue of being affected by the impact of Federal installations, the State Board of Education is hereby authorized to increase the amount of local funds required for such school system to participate in State funds, as provided in subsection (4) of this section, by the total amount, or any part thereof, of Federal funds so received.

SECTION 6. *Be it further enacted,* That in order to determine the amount of State minimum foundation school program equalizing funds for current operation and maintenance purposes for the public schools, grades one through [fol. 225] twelve, to be distributed each year to an equalizing county, city, or special school district for the public schools, grades one through twelve, the following procedure shall be used; From the total cost for the current school year of the minimum foundation school program for current operation and maintenance purposes, as defined in Section 4 of this Act, for the public schools, grades one through twelve, in the county, city, or special school district, there shall be subtracted the amount of its pro rata share, the share as between the county and the cities and special school districts therein to be based on the average daily attendance in grades one through twelve of the public schools during the preceding school year, of the local funds required to be contributed by the county as ascertained in Section 5 of this Act. The remainder shall represent the amount of State minimum foundation school program equalizing funds for current operation and maintenance purposes for the public schools, grades one through twelve, due the county, city, or special school district for the current school year.

NON-EQUALIZING SYSTEMS

SECTION 7. *Be it further enacted,* That if any county, city, or special school district shall elect not to participate in State equalizing funds or shall fail to comply with the requirements for participation in equalizing funds, there shall be distributed from the appropriation made in Section 2 of this Act for current operation and maintenance of the public schools of this State, grades one through twelve, to such county, city, or special school district in lieu of any payment of equalizing funds an amount equal to the sum of the following: (1) Seventeen ($17.00) Dollars per capita per pupil in average daily attendance in grades one through twelve, of the public schools during the preceding school [fol. 226] year; (2) Five Hundred ($500.00) Dollars per teaching position actually maintained during the current school year, provided that the number of teaching positions upon which the Five Hundred ($500.00) Dollar allowance shall be made shall not be greater than one such position for each twenty-five (25) pupils in average daily attendance in grades one through twelve, of the public schools during the current school year; (3) Five Hundred ($500.00) Dollars for each teacher of exceptional children in special education allowed and used under rules and regulations prescribed by the State Board of Education and approved by the State Commissioner of Education; (4) Five Hundred ($500.00) Dollars for one position of superintendent per county, city, or special school district actually maintained during the current year and for which no other provision has been made; (5) Eight Hundred ($800.00) Dollars per annum per position for system-wide positions allowed and used under the rules and regulations prescribed by the State Board of Education and approved by the State Commissioner of Education; (6) the increase in salary to which teachers, principal-teachers and superintendents allowed and used under the provisions of this section are entitled under the State salary schedule provided for in Section 10 of this Act over and above the salary schedule adopted by the State Board of Education for the school year 1948-49; and (7) salary supplement of school clerical employees and/or per capita amounts for clerical services as may be

allowed by the State Board of Education and approved by the State Commissioner of Education.

There shall be allocated from the appropriations made in Section 2 of this Act, subject to the provisions of Section 4 of this Act, an aggregate annual amount for the cost [fol. 227] of pupil transportation services in the non-equalizing counties; for the fiscal year beginning July 1, 1959, the amount of Eight Hundred Seventy-two Thousand ($872,000.00) Dollars is hereby allocated; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter the amount of Eight Hundred Seventy-two Thousand ($872,000.00) Dollars is hereby allocated. The distribution of funds for pupil transportation purposes shall be made only to non-equalizing counties maintaining a transportation system approved by the State Board of Education, and the amount distributed to each non-equalizing county shall not exceed Eight ($8.00) Dollars per pupil in average daily attendance for the previous school year, who lives not less than one and one-half (1½) miles from the school to which he is assigned by the respective board of education and in which he is enrolled and transported at public expense, and an amount not to exceed Eight ($8.00) Dollars for each physically handicapped pupil who lives less than one and one-half (1½) miles from the school to which he is assigned by the respective board of education and in which he is enrolled and transported in accordance with the rules and regulations of the State Board of Education and approved by the State Commissioner of Education.

SECTION 8. *Be it further enacted,* That in order for any county, city or special school district to receive the State funds herein appropriated in Section 2 for the purpose of current operation and maintenance of the public schools, grades one through twelve, such county, city, or special school district shall meet the following conditions and requirements:

(1) *Equalizing and Non-Equalizing Systems*

[fol. 228] (a) Each county, city, or special school district shall pay the teachers, principal-teachers, superintendents, and other school personnel at least as much as is provided

in the State salary schedules prescribed by the State Board of Education and approved by the State Commissioner of Education, as herein provided.

(b) Each county, city, or special school district shall maintain a term of not less than two hundred (200) days which shall consist of the following: not less than one hundred seventy-five (175) days for classroom instruction; not less than ten (10) days vacation with pay for teachers under policies recommended by the local superintendent of schools and adopted by the local board of education; ten (10) days in-service training, according to a plan recommended by the local superintendent of schools and adopted by the local board of education; provided that a copy of such plan shall be filed with the State Commissioner of Education on or before September 1 of the current school year; and five (5) other days as designated by the local board of education upon the recommendation of the local superintendent of schools.

(c) Each county, city, or special school district in this State shall levy for current operation and maintenance not more than one school tax for all grades one through twelve, or for such of these grades as may be included in the local school program, and shall place in one separate school fund all school revenues for current operation and maintenance purposes received from the State, county, and other political subdivisions, if any, for school purposes. However, any non-equalizing county having within its borders cities or special school districts operating a system of public schools, [fol. 229] maintaining a system of public school transportation for grades one through twelve may levy a special tax for said purpose. In the event any non-equalizing county maintains a system of public school transportation for grades one through twelve, and elects to levy such special tax, the proceeds of the said special tax, together with such funds as may be received from the State for public school transportation purposes, shall be placed by the county trustee in a special account hereafter to be known as the "Public School Pupil Transportation Fund" and the same shall be disbursed on order of the county board of education for public school pupil transportation services only.

All school funds for current operation and maintenance purposes collected by any county, except the funds raised by any local special tax levy in a non-equalizing county for transportation purposes as hereinabove provided in this subsection, shall be apportioned by the county trustee among the counties, cities, and special school districts therein on the basis of the average daily attendance maintained by each in grades one through twelve during the current school year as defined in this subsection; provided, however, any county which was a non-equalizing county in 1955-56 and which has within its borders, a city or special district operating a system of public schools and which county in the current school year is an equalizing county which operates a system of public school transportation for grades one through twelve, may levy a special tax to cover that portion of the total cost of such public school transportation system as is over and beyond the allowed cost of pupil transportation within the minimum foundation school program of such equalizing county as determined under the provisions of Section 4, Subsection (2) of this Act. The proceeds of such special transportation tax levy shall be set up in a special account hereinafter to be known [fol. 230] as the "Public School Pupil Transportation Fund" and shall be disbursed on order of the county board of education for public school transportation services only. All school funds for current operation and maintenance purposes collected by any county, except the funds raised by any local special pupil transportation tax levy as authorized in this subsection, shall be apportioned by the county trustee among the county, city, and special school districts therein on the basis of the average daily attendance maintained by each in grades one through twelve, during the current school year. For the purposes of making the apportionment of local school funds as set forth in this subsection, and in defining the average daily attendance for the current school year, the county superintendent of schools and the county trustee shall be guided by the following procedure: (1) the county superintendent of schools shall recertify to the county trustee at the end of the first quarter of the current fiscal school year the average daily attendance in grades one through twelve during the pre-

ceding school year; (2) during each of the first and second quarters of the current fiscal school year the county trustee shall use the average daily attendance figure for the preceding school year as recertified to him by the county superintendent of schools, in making the tentative apportionments of the school funds, as provided for in this subsection during the first and second quarters of the current fiscal school year; (3) before the end of the third quarter of the current fiscal school year the county superintendent of schools shall certify to the county trustee the best estimate which he can make of the average daily attendance in grades one through twelve in the county schools and in the schools of the city and special school districts in such county, during the current school year, and upon this best estimate, the county trustee shall make the tentative apportionments of [fol. 231] school funds for the third quarter of the current fiscal school year; (4) as early as possible before the close of the current fiscal school year, the county superintendent of schools shall certify to the county trustee, the correct average daily attendance in grades one through twelve for the entire current school year; (5) whereupon, the county trustee shall apportion the entire amount of county school funds for the current school year in keeping with the provisions of this subsection, on the basis of the correct total average daily attendance in grades one through twelve during the current school year in the county schools and in the respective city and special district schools, making such adjustments as may be necessary on account of the tentative apportionments made to such school systems during the first three quarters of the current fiscal school year. However, any county school system, and any other school system in the same county, which have been dividing, or may decide to divide, local school funds on any different basis may continue or determine to do so by Act of the Legislature, as in Chapter 711 of the Private Acts of 1947, as amended.

(d) All schools in any county, city, or special school district shall meet the requirements of the State Board of Education for an approved school. No school in any county, city, or special school district shall be considered in determining the amount of the State school funds due such

county, city, or special school district unless it meets the requirements of the State Board of Education for an approved school.

(e) No tuition or fees shall be charged by any city or special school district except to pupils residing outside the city, or special school district. Tuition or fees which may [fol. 232] be charged to pupils residing outside the cities or special school districts but within the county in which the city or special school district is located shall not exceed ____ per pupil, per annum, an amount equal to the amount of funds actually raised and used for current operation and maintenance purposes from the city, or special school district sources, including tuition and fees during the preceding school years, divided by the number of pupils in average daily attendance in the public schools of the city or special school district during the preceding school year.

(2) *Additional Conditions and Requirements for Equalizing Systems*

It is further provided that in order for any county, city, or special school district to share in State equalizing funds for current operation and maintenance of public schools, as provided in this Act, it shall comply, in addition to the conditions and requirements hereinbefore in this section, with the following conditions and requirements:

(a) The county, including the cities and special schools districts therein, shall raise for school purposes from local sources at least its share of the cost of the minimum foundation school program for current operation and maintenance purposes for public schools, grades one through twelve, as determined in the manner prescribed in Section 5 of this Act; provided, however, that nothing in this section shall prohibit the county, city, or special school district from budgeting and spending any local funds over and beyond the amount of local school funds required for participation in the State minimum foundation school program for the [fol. 233] public schools, grades one through twelve, for current operation and maintenance purposes, or for other school purposes.

(b) State equalizing funds received by a county, city or special school district shall be used exclusively for the operation and maintenance of the schools under the minimum foundation school program during the current fiscal school year unless otherwise provided in this Act. Outstanding school warrants and obligations of a preceding fiscal school year or years shall not be paid out of either the State equalizing funds for the current fiscal school year or the local funds required to be raised during the current fiscal school year for participation in the State equalizing funds.

(c) A city or special district participating in State minimum foundation school program equalizing funds for the public schools, grades one through twelve, for current operation and maintenance purposes, shall raise and expend annually for current operation and maintenance of the public schools in said city, or special school district, an amount of money in addition to the amount required to be raised by the county at least equal to that which a fifteen (15¢) cent tax levy on each One Hundred ($100.00) Dollars of taxable property for the current year in said city or special school district would produce if the same were all collected.

SECTION 9. *Be it further enacted,* That county, city, or special school district boards of education in counties which are adjacent to other states may contract with the appropriate local or state officials in the adjoining state for the education of children in grades one through twelve, provided that the board of education of the Tennessee county, city, or special school district and the State Commissioner of [fol. 234] Education determine that such an arrangement is the most economical way of providing a reasonable education for children under the jurisdiction of such boards. Such contract shall be executed by the appropriate board of education and approved by the State Commissioner of Education and the Attorney General of the State prior to the enrollment of such children in the schools of the other state. The cost of educating such children in accordance with the terms of such contracts shall constitute a part of

the costs of the minimum foundation school program of the respective county, city, or special school districts.

SECTION 10. *Be it further enacted*, That the State Board of Education shall formulate a State salary schedule to be effective for the school year 1959-60 which shall include as a base, a salary of at least Twenty-five Hundred Fifty ($2550.00) Dollars per school year consisting of a term of two hundred (200) days as hereinbefore defined in this Act for the beginning certificated teacher with a Bachelor's Degree from a college approved by the State Board of Education, with teachers having more training and experience to receive more than Twenty-five Hundred Fifty ($2550.00) Dollars per school year, and with teachers having less training and experience to receive less that Twenty-five Hundred Fifty ($2550.00) Dollars per school year; provided that such State salary schedule shall not be applicable to substitute teachers under the State sick leave plan. The minimum salary for the school year 1959-60 of a certificated teacher, principal-teacher, or superintendent with a Bachelor's Degree from an approved college and with fifteen (15) or more years of teaching experience, or experience as a principal or superintendent shall not be less than Thirty-three Hundred ($3300.00) Dollars per school year. The [fol. 235] salary schedule to be effective for the school year 1959-60 formulated by the State Board of Education as directed hereinabove in this paragraph, shall provide a salary increase for such category of training and experience over the salary schedule adopted by the State Board of Education for the biennium beginning July 1, 1957 under authority of Section 10, Chapter 5 of the Public Acts of 1957, of not less than One Hundred ($100.00) Dollars per school year. The State Board of Education shall formulate a State salary schedule to be effective for the school year 1960-61 which shall provide a salary increase for each category of training and experience over that for the school year 1959-60 of not less than One Hundred ($100.00) Dollars per school year. It is provided, however, that no salary increase shall be granted by the said salary schedule for either year of the biennium 1959-61 to any person teaching under the authority of a permit, unless such person pos-

sesses a valid certificate, or a Bachelor's Degree from a college approved by the State Board of Education. The salaries as prescribed in this paragraph shall be payable in at least ten (10) monthly installments during any school year.

The State salary schedule authorized in this section is hereby made applicable to every teacher, principal-teacher, and superintendent in every public school in this state, whether in counties, cities, or special school districts. The State salary schedule authorized in this section is also hereby expressly made applicable to teachers in the Tennessee School for the Blind, the Tennessee School for the Deaf, the Tennessee Preparatory School and the Alvin C. York Institute, but such salaries as provided by the above-mentioned schedule shall be paid solely out of the State appropriations made to said respective State schools.

[fol. 236] If any county, city, or special school district allowed any teacher, principal, or superintendent at the beginning of, or during the 1957-58 school term an amount in addition to the salary to which he would be entitled under the State salary schedule in effect at the beginning of or during the 1957-58 school term, which additional amount was paid entirely out of local funds, then, and in that event, said county, city, or special school district shall continue to pay such additional amount out of local funds, it being the legislative intent that every teacher, principal, and superintendent employed by any county, city, or special district shall receive an annual salary of not less than that contracted for as of the beginning of, or during the 1957-58 school term as defined hereinabove in this paragraph, plus the salary increases provided in this section; provided, however, that in any instance where the cognizant county, city, or special school district board of education determines that the salary paid to a teacher, principal, or superintendent during said period was disproportionate to the salaries paid to other teachers, principals, or superintendents with comparable tenure, education, and qualifications, in said county, city, or special school district, and was in excess of the State salary schedule for said period, the said

county, city, or special school district board of education shall be empowered to make such readjustment in the salary of said teacher, principal, or superintendent as may be necessary to place said salary in fair relation to the salaries of other teachers, principals, or superintendents in the same county, city, or special school district with comparable tenure, education, and qualifications; provided that any teacher, principal, or superintendent shall be entitled to a hearing before the county, city, or special school district board of education, as the case may be. However, in computing the salaries required to be maintained as pro- [fol. 237] vided hereinabove in this paragraph, only that part thereof paid under the authority of any political subdivision of this State need be maintained and no county, city, or special school district shall be required to supply any decrease in funds formerly available to supplement salaries. Provided further, however, that the State Board for Vocational Education is authorized, in its discretion, to make such adjustments in State supplements of vocational funds as are necessary to establish a uniform State salary schedule for teachers of vocational subjects.

The salaries provided by the above-mentioned schedule authorized in this section are intended to apply to full-time teachers, principal-teachers and superintendents. The salary per annum for a part-time teacher, principal-teacher, or superintendent shall be proportionately less than that herein provided for full-time personnel.

Nothing in this Act shall prevent any county, city, or special school district from supplementing from its own local funds over and beyond those local funds required for participation in State funds any salaries allowed under the State salary schedule authorized in this section.

Whereas, it is recognized that public education is one of the important bedrocks upon which our country is being built; and, whereas, well-trained and dedicated teachers are necessary to the proper training of our citizenry; it is the intent of the Legislature and is hereby so declared that the salary schedule as recommended by the Legislative Council Report, ranging from Thirty-six Hundred ($3600.00) Dollars per year of ten (10) months for a beginning teacher holding a Bachelor's Degree with twelve (12) years

[fol. 238] of teaching experience, with appropriate increases for other levels of training and experience, shall be a goal which shall be attained from both State and local funds as early as the economic condition of the State will permit. It is further declared to be the legislative intent that when such range of from Thirty-six Hundred ($3600.00) Dollars for a beginning teacher with a Bachelor's Degree, to Fifty-four Hundred ($5400.00) Dollars for a teacher with a Bachelor's Degree and twelve (12) years of teaching experience, with appropriate increases for other levels of training and experience, has been reached with State and local funds, no local supplement which is being paid shall be required to be continued beyond the amount which, when added to the amount of minimum school program funds provided by the State to the teachers through an equalizing or a non-equalizing school system, totals a sum equal to the amount of the salary of the teacher within such range of from Thirty-six Hundred ($3600.00) Dollars to Fifty-four Hundred ($5400.00) Dollars, depending upon the teaching experience of the teacher.

Section 11. *Be it further enacted,* That there is hereby allocated from the appropriation made in Section 2 of this Act, for the current operation and maintenance of the public schools of this State, grades one through twelve, for the fiscal year beginning July 1, 1959 Three Hundred Fifty Thousand ($350,000.00) Dollars, and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter Four Hundred Thousand ($400,000.00) Dollars for the purpose of providing special educational services, of reimbursing local school systems for salaries paid to teachers in hospitals and convalescent homes for exceptional children in Tennessee in grades one through twelve, and of providing [fol. 239] in-service training for teachers of exceptional children in Tennessee. Such amounts shall be expended under the rules and regulations of the State Board of Education, as approved by the State Commissioner of Education and as prescribed and defined in Sections 49-2901 and 49-2902 of Tennessee Code Annotated; provided that special educational services shall be interpreted to mean the "excess cost" of special transportation and such measures that may be necessary for the adjustment of exceptional children and for providing for their education in the public schools; pro-

vided further that such "excess cost" for special educational services for exceptional children shall be administered in accordance with objective standards prescribed by the State Board of Education and approved by the State Commissioner of Education; and provided further that in no case shall such "excess cost" amount to more than Three Hundred ($300.00) Dollars per school year, per child.

The State Commissioner of Education may, at his discretion, under rules and regulations of the State Board of Education, as approved by him, reimburse to the extent provided in such rules and regulations, with funds herein allocated in this section, counties, cities, and special school districts for expenditures incurred by such counties, cities, or special school districts for providing, on an experimental basis, educational services for blind or deaf children; the provisions of Section 49-2901 of the Tennessee Code Annotated or any law of this State notwithstanding.

SECTION 12. *Be it further enacted,* That approximately one-third (1/3) of the estimated total of State funds appropriated under Section 2 of this Act and distributed under the provisions of this Act, for the current operation and [fol. 240] maintenance of the public schools of this State, grades one through twelve, for the school year shall be distributed on or about August 15 but not later than September 10; approximately one-third (1/3) of the estimated total for the school year shall be distributed on or before November 15; approximately two-ninths (2/9) of the estimated total for the school year shall be distributed on or before February 15, and the amount of the remainder due each county, city, and special school district for the school year shall be determined on or about May 20 of such school year, or as near this date as the State Commissioner of Education shall be filed by said county, city, or such remainder due shall be determined on the basis of the records which such county, city, and special school district shall furnish the State Commissioner of Education on forms prescribed by him. The actual delivery of the warrant covering the final distribution to a county, city, or special school district shall not be made until after all records required by the State Commissioner of Education have been

furnished. Before a full and complete settlement is made with any county, city, or special school district of the State for any year, all records and reports required by the State Commissioner of Education shall be filed by said county, city, or special school district, with the State Commissioner of Education. Each county, city, and special school district shall within fifteen (15) days after the beginning of each of its fiscal school years, submit to the State Commissioner of Education, on forms prescribed by him, a complete and certified copy of its entire school budget for the current school year. Each county, city, and special school district shall on or before July 15 of each year submit to the State Commissioner of Education on forms prescribed by him, a correct and accurate financial report of the receipts and expenditures for all public school purposes in each county, [fol. 241] city, or special school district, during the school year ending on the June 30 next preceding the July 15 hereinabove set forth. The county trustee of each county and the treasurer or fiscal agent of each city or special school district shall submit to the State Commissioner of Education on or before July 15 of each school year a complete certified copy of their respective financial reports, on forms prescribed by the State Commissioner of Education. No distribution of funds shall be sent to any county, city, or special school district which has not furnished the State Commissioner of Education with all records and reports required by this Act and by other laws for the current or the preceding school year.

In making distribution of State funds to the counties, cities, and special school districts, no allowance shall be made by the State for the average daily attendance or teaching positions in any county, city, or special district school in which the right to exercise authority of the respective local superintendent of schools and the local board of education is not as full and ample in all phases of the school program as in any other school of the said county, city, or special school district.

Section 13. *Be it further enacted,* That in the event that the appropriations made by the Legislature in Section 2 of this Act for the current operation and maintenance of the public schools of this State, grades one through twelve,

are insufficient to meet the State's obligations for the current operation and maintenance of the public schools of this State, grades one through twelve, as provided for in this Act, the State Commissioner of Education is hereby directed to make reduction in the amount of State funds for which each equalizing and non-equalizing county, city, [fol. 242] or special school district may qualify for current operation and maintenance of public schools, grades one through twelve. The percentage of reduction shall be the same for all counties, cities, and special school districts.

SECTION 14. *Be it further enacted,* That for the purpose of purchasing textbooks, repairing and rebinding textbooks for the public schools of this state, grades one through twelve, there is hereby appropriated Two Million, Four Hundred Thousand ($2,400,000.00) Dollars for the fiscal year beginning July 1, 1959, and subject to the provisions of Section 39 of this Act, Two Million, Three Hundred Fifty Thousand ($2,350,000.00) Dollars for the fiscal year beginning July 1, 1960 and each fiscal year thereafter, out of the treasury of the State, which sums shall be distributed by the State Commissioner of Education among the counties, cities, and special school districts operating a system of public schools as herein provided in this section.

(1) The State Commissioner of Education shall distribute on or about August 1 of each year to each county, city, and special school district operating a system of public schools a per capita amount of Three ($3.00) Dollars, per annum, per pupil in average daily attendance during the preceding school year.

(2) The State Commissioner of Education shall determine for each county, city, and special school district, the amount of increase, if any, in average daily attendance of pupils for the immediate past school year over that of the school year preceding. He shall then add an additional amount to that provided in (1) above for each county, city, and special school district in which such an increase has [fol. 243] occurred, which amount shall be calculated by multiplying a per capita of Eight ($8.00) Dollars, or such per capita as shall be fixed by him, by the number of the

increase in the pupil average daily attendance as hereinbefore described.

The amount distributed under the provisions of this section shall be placed in a special fund or account by the county trustee, or by the treasurer or proper fiscal officer of the city or special school district and shall be expended only on regular school warrants, or checks marked "State Textbook Funds."

It is the legislative intent, and so expressly declared, that the board of education of each county, city, and special school district shall purchase the necessary textbooks early enough that the pupils shall have the textbooks available to them when the schools open. The board of education of each county, city, and special school district shall furnish such textbooks as are listed by the State Textbook Commission for adoption and as have been adopted by the board of education of such county, city, or special school district and as are required for the use of pupils by the said board of education. The list of textbooks by grades, which are to be furnished pupils, shall be filed with the State Commissioner of Education by August 1 of each year, on forms prescribed by him. The superintendent of schools and the chairman of the board of education of each county, city, and special school district shall certify to the State Commissioner of Education on or before December 1 of the current school year, on forms prescribed by the said Commissioner, that all children enrolled in that school system have been furnished all required textbooks. All books purchased with funds apportioned under this section [fol. 244] are, and the same shall remain, the property of the board of education purchasing them, and the said board of education shall establish such policies as it deems necessary for the care and protection of said textbooks. No board of education of any public school system shall require any pupil or parent to purchase any textbooks whatsoever; but nothing in this section shall prohibit any pupil or parent from voluntarily purchasing textbooks.

All State textbook funds apportioned to a county, city, or special school district under the provisions of this section shall be used exclusively for the purchase of textbooks at wholesale prices, plus freight from Nashville, and the repair and rebinding of textbooks.

It is further provided, however, that the county trustee shall not be required to place the said textbook funds in a special fund or account in the event of the following: (1) That the State Commissioner of Education approves the system of controls and records of the respective superintendent and board of education to be used for the expending, accounting, and reporting of the said funds; and (2) the State Comptroller upon being so informed by the State Commissioner of Education gives notice to the said trustee that it is not necessary for him to maintain such fund or account.

SECTION 15. *Be it further enacted,* That for the purpose of capital outlay, including the purchase and improvement of sites, the construction of buildings, the major repairs of buildings of a capital outlay nature, the purchase of equipment for schools and school buildings and the purchase of pupil transportation equipment, for the public schools of this State, grades one through twelve, there is [fol. 245] hereby appropriated for the fiscal year beginning July 1, 1959, Eight Million, Three Hundred Thousand ($8,300,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter there is hereby appropriated, subject to the provisions of Section 39 of this Act, Eight Million, Four Hundred Thousand ($8,400,000.00) Dollars out of the treasury of the State, which sums shall be distributed among the several counties, including the cities and special school districts therein, of the State upon the conditions hereinafter prescribed in this section.

(1) There shall be a foundation school program for capital outlay for the public schools of the State, grades one through twelve, and the annual cost thereof for each county, city, and special school district shall be determined on the basis of a per capita amount per pupil in average daily attendance during the preceding school year, such amount to be fixed by the State Board of Education and approved by the State Commissioner of Education.

(2) There shall be calculated for each fiscal year the cost of the foundation school program for capital outlay for each county, including the cities and special school

districts therein, and for the State as a whole as provided in subsection (1) of this section.

(3) Forty-two and one-half (42½%) per cent of the aggregate cost of the foundation school program for capital outlay for the entire State shall be determined in order to ascertain the aggregate amount of funds assumed to be available locally in support of the foundation school program for capital outlay.

(4) The amount of funds which each county, including [fol. 246] the cities and special school districts therein, shall be assumed to have available locally for the support of the foundation school program for capital outlay shall be determined by applying the county's per cent of the total estimated true value of taxable property in the State as determined in Section 5 of this Act, to the aggregate amount of funds assumed but not required to be available locally, determined as in subsection (3) of this section.

(5) The amount of funds assumed to be available locally in a county for the support of the foundation school program for capital outlay, as determined in subsection (4) of this section, shall be subtracted from the cost of the foundation school program for capital outlay for each county, as determined in subsection (2) of this section, and the remainder shall be the amount of State capital outlay funds which the county, including the cities and special school districts therein, shall receive; provided that no county, including the cities and special school districts therein, shall receive less State school capital outlay funds annually than was distributed to such county for school capital outlay purposes including residue funds distributed under Section 18, Chapter 9, Public Acts of 1949 for the fiscal year 1950-1951.

The capital outlay funds to be distributed to a county, including the cities and special school districts therein, shall be apportioned by the State Commisioner of Education between the county and cities and special school districts therein operating a system of public schools, on the basis of the number of teaching positions allowed and maintained in grades one through twelve during the preceding school year in such county and in the respective cities and special school districts therein operating a system of [fol. 247] public schools; provided that the amount appro-

priated and apportioned under this section shall be distributed to the county trustee, or the appropriate fiscal officer of the city, or special school district, as provided in Section 19 of this Act, in three installments, approximately one-fourth (¼) on or about August 1, approximately one-fourth (¼) on or about January 15, and the remainder on or about April 15 of each year.

An amount not to exceed fifteen (15%) per cent of the county's share of any fund distributed to any county under the provisions of this section may be used for the operation of privately owned pupil transportation equipment on a contract basis. The amount of funds so distributed to the respective counties, cities, and special school districts under the provisions of this section may be used in the discretion of the county, city, or special school district board of education for the payment of the principal and interest on any bonds of original issue, or other forms of legal indebtedness of original issue, issued by said county, city, or special school district for school capital outlay purposes since July 1, 1947, including school bonds refunding school capital outlay of bonds of original issue since July 1, 1947.

State funds for public schools, grades one through twelve, for capital outlay purposes distributed under the provisions of this section shall be placed in a special fund or account by the county trustee, or by the treasurer or proper fiscal officer of the city, or special school district, and shall be expended only on regular school warrants, or checks, marked "State Capital Outlay School Funds."

The State funds for the public schools, grades one through twelve, for capital outlay purposes distributed under the [fol. 248] provisions of this Act shall be obligated and/or expended only according to a plan recommended by the local superintendent of schools and approved by the local board of education and filed with the State Commissioner of Education, on forms prescribed by him, on or before August 1 of the current school year; provided that such plan may be amended during the school year to meet changing conditions or emergencies but such amendment shall be filed with the State Commissioner of Education before any funds referred to hereinabove in this paragraph shall be obligated or expended for the purpose of the amendment.

The State Board of Education is hereby authorized to establish minimum standards for school sites, school attendance centers, the construction of buildings for school purposes, the major repairs of buildings for school purposes of a capital outlay nature, and for equipment for buildings for school purposes. No county, city, or special school district board of education shall obligate or expend any State or local school funds for any project of a capital outlay nature which does not conform to the standards adopted by the State Board of Education as authorized in this paragraph.

The State Board of Education is hereby authorized and directed to establish minimum standards for school sites and buildings for the approval of schools.

SECTION 16. *Be it further enacted,* That there is hereby appropriated the sum of Three Hundred Forty Thousand ($340,000.00) Dollars, per annum, from the treasury of the State for the reimbursement of the counties, cities, and special school districts for payments made by them for [fol. 249] substitute teachers who are teaching for teachers on sick leave, but this appropriation is subject to all the restrictions and conditions set forth herein and in Section 49-1314 of Tennessee Code Annotated. The reimbursement made under this appropriation to any county, city, or special school district shall not exceed one-half of the payments made by such county, city, or special school district for substitute teachers teaching for teachers who are on sick leave, but in any event the contribution of the State shall not exceed Three ($3.00) Dollars per day per substitute teacher. Before any county, city, or special school district can participate in the appropriations made in this section, it shall conform to the requirements set forth in Section 49-1314 of Tennessee Code Annotated. Participation in the sick leave plan provided by this section shall be optional with the local school system.

It shall not be necessary for substitute teachers substituting for regular teachers on sick leave under the provisions of this section to possess a teacher's certificate, or permit.

Under rules and regulations to be prescribed by the State Board of Education, and approved by the State Commissioner of Education, there shall be distributed to each

county, city, and special school district complying with all such requirements an amount not to exceed Three ($3.00) Dollars per day for each substitute teacher employed by local school systems sharing in the benefits of this section; provided that the amount distributed by the State shall in no event exceed one-half of the amount paid per day by the local school system to the substitute teacher, and the State's contribution shall in no event exceed Three ($3.00) Dollars per day. The total amount which the State shall be required [fol. 250] to contribute to match payments to substitute teachers under this section shall not exceed Three Hundred Forty Thousand ($340,000.00) Dollars per annum.

Nothing in this section shall be construed as prohibiting any county, city, or special school district from paying more than Six ($6.00) Dollars per day to a substitute teacher, but any amount in excess of Six ($6.00) Dollars per day shall be paid entirely from local funds.

Section 17. *Be it further enacted,* That if as of July 1 of any school year there has been a change since the beginning of the previous school term in the boundaries of a city, or special school district and/or the creation or reactivation of a city, or special district school system involving the shift of pupils from one school system to another, then, and in that event, in the distribution of any funds appropriated by this Act, whether for current operation and maintenance, capital outlay, textbooks, or otherwise, to a county having within its boundaries any such city, or special school district operating a system of public schools, grades one through twelve, the following shall apply:

The State Commissioner of Education shall determine on the basis of information submitted to him by the appropriate boards of education, the average daily attendance of pupils residing in such affected area and the number of teaching positions, if any, involved in such shift, and shall make such adjustments in the pupil average daily attendance and/or the number of teaching positions as may be necessary to effectuate an equitable distribution and division of funds as between the county and any city, or special school district operating a system of public schools therein, and such adjusted pupil average daily attendance and/or [fol. 251] teaching positions shall be used in making the

apportionment and distribution of any funds appropriated by this Act, whether for current operation and maintenance, capital outlay, textbooks, or otherwise; provided, however, that before any school system which is reactivated or newly created after July 1, 1958, shall participate in the apportionment of any State school funds, or share in the apportionment of any county school funds during any biennium, the chief fiscal agent of the county, city, or special district in which said school system is located, shall certify to the State Commissioner of Education on or before March 1 preceding the pertinent biennium that such county, city, or special school district has met all requirements for participation in State school funds, and furthermore such certification shall be accompanied by such evidences of compliance as the State Commissioner of Education may require.

SECTION 18. *Be it further enacted,* That the State Commissioner of Education is hereby expressly authorized to prescribe a system of school fiscal accounting for all counties, cities, and special school districts. The State Commissioner of Education is hereby expressly authorized to check the fiscal public school records in any or all counties, cities, or special school districts to the end that the expenditure of such funds, whether for current operation and maintenance purposes, capital outlay purposes, or other school purposes, shall be properly accounted for and safeguarded. Any city or special district school system shall deliver to the State Commissioner of Education, upon a request from him, a copy of the audit report of the school funds of the said city or special district school system. Each county, city, or special school district board of education shall issue school warrants, or checks, on or before June 30 of each [fol. 252] fiscal year for all contracts and other fiscal transactions for current operation and maintenance purposes for the current school year which have been completed by June 15 of the current school year.

SECTION 19. *Be it further enacted,* That the funds appropriated and distributed for the public schools, grades one through twelve, under the provisions of this Act to a county for county schools shall be paid to the county trustee

in the amounts as certified under the authority of the State Commissioner of Education. Such funds for city schools, or for special district schools, shall be distributed directly to the treasurer or proper fiscal agent of such city or special school district in the amounts as certified under the authority of the State Commissioner of Education. The county trustee shall be properly bonded as now provided by law and the county judge, or chairman of the county court, shall so certify to the State Commissioner of Education. The city and special school district treasurer or fiscal agent shall be bonded under standards set up by the State Comptroller, and the chairman of the board of education of such city, or special school district, shall so certify to the State Commissioner of Education.

SECTION 20. *Be it further enacted,* That should it develop that by error an allocation of funds has been made to any county, city, or special school district not entitled to receive the same by virtue of a failure to comply with the requirements of this Act, or otherwise, or if it should develop that more funds have been distributed to any county, city, or special school district than such county, city, or special school district is entitled to receive under the provisions of this Act, such amount so erroneously dis- [fol. 253] tributed to such county, city, or special school district shall be returned to the State Treasury by such county, city, or special school district; and upon a failure to do so, the State Commissioner of Education is hereby expressly authorized and directed to retain and withhold the amount thereof from any funds available for distribution to such county, city, or special school district in the current, or any subsequent school year.

If any school funds are misappropriated or illegally expended by a county, city, or special school district, an amount equivalent thereto shall be returned to the proper county, city, or special district school fund; and upon a failure to do so, the State Commissioner of Education is hereby expressly authorized and directed to retain and withhold the amount thereof from any funds available for distribution to such county, city, or special school district in the current, or any subsequent school year.

Whenever it shall appear to the Commissioner of Education from the report of any school official, or from any other reliable source, that any portion of the school fund has been lost, misappropriated, or in any way illegally disposed of, or not collected, or is in danger of loss, misappropriation, illegal disposition, or failure of collection, it shall be the duty of the said Commissioner to call upon the District Attorney General of the judicial circuit, or county judge, chairman of the county court, or county attorney of the county, to protect, recover, or take action to enforce the collection of such funds, provided the Governor shall first give his approval to such action. This provision, however, shall not prohibit suits by one political subdivision against another political subdivision in the same county or against the county when the consent of the State Commis- [fol.254] sioner of Education and the Governor has not been obtained. The State Commissioner of Education, with the consent of the Governor and with the approval of the Attorney General, is hereby authorized to employ private legal counsel in order to protect, recover, or force collection of any school funds.

SECTION 21. *Be it further enacted,* That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, grades one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school.

OTHER SCHOOL SERVICES

SECTION 22. *Be it further enacted,* That,

(a) There is hereby appropriated for vocational education the sum of One Million, One Hundred Twenty-three Thousand ($1,123,000.00) Dollars, per annum. Said appropriation for vocational education shall be administered by the State Board for Vocational Education through the executive officer of said Board, in accordance with the State plan for vocational education, drawn up by said State Board

for Vocational Education and approved by the U. S. Office of Education. The said appropriation for vocational education shall be used to match, as required by Federal statute, funds appropriated and paid over by the Federal government for the same purpose as the appropriation made for [fol. 255] vocational education. All expenses of administration of the funds appropriated for vocational education shall be paid from such appropriation, as supplemented by funds received from the Federal government; and,

(b) There is hereby appropriated for the vocational training program the sum of Four Hundred Forty-seven Thousand ($447,000.00) Dollars, per annum. Said appropriation for the vocational training program shall be administered by the State Board for Vocational Education through the executive officer of said Board, in accordance with the State plan for vocational education, drawn up by said State Board for Vocational Education and approved by the U. S. Office of Education. The said appropriation for the vocational training program shall be used to match, as required by Federal Statute, funds appropriated and paid over by the Federal government for the same purpose as the appropriation made for the vocational training program.

Section 23. *Be it further enacted,* That there is hereby appropriated for the fiscal year beginning July 1, 1959, for vocational rehabilitation the sum of Six Hundred Thousand ($600,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter, there is hereby appropriated the sum of Six Hundred Thousand ($600,000.00) Dollars out of the treasury of the State. The said appropriation for vocational rehabilitation shall be administered by the State Board for Vocational Education through the executive officer of the said board, in accordance with a State plan for vocational rehabilitation, drawn up by said State Board for Vocational Education and approved by the U. S. Office of Vocational Rehabilitation.

[fol. 256] Section 24. *Be it further enacted,* That for the purpose of providing for an in-service training program for school personnel and for the purpose of up-grading the professional personnel of the State Department of Educa-

tion, there is hereby appropriated the sum of Forty-five Thousand ($45,000.00) Dollars, per annum, which sum shall be expended by the State Commissioner of Education for such item or items, or purpose or purposes, as the said Commissioner may deem necessary in order to properly effectuate such programs as are herein authorized; provided that where teacher training is involved, a cooperative plan shall be entered into between the State Department of Education and such colleges and universities as the State Commissioner of Education shall designate.

SECTION 25. *Be it further enacted,* That all agencies, bureaus, and departments contributing to the in-service training of school personnel and/or participating in the program of public education in any manner shall channel their efforts through the office of the State Commissioner of Education.

SECTION 26. *Be it further enacted,* That for the operation and maintenance of the special State schools, there is hereby appropriated the following sums:

Alvin C. York, Agricultural Institute for the fiscal year beginning July 1, 1959, One Hundred Two Thousand ($102,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter there is hereby appropriated the sum of One Hundred Two Thousand ($102,000.00) Dollars;

Tennessee School for the Blind for the fiscal year beginning July 1, 1959, Three Hundred Twenty-five Thousand [fol. 257] ($325,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter there is hereby appropriated the sum of Three Hundred Thirty-five Thousand ($335,000.00) Dollars;

Tennessee School for the Deaf for the fiscal year beginning July 1, 1959, Five Hundred Thirty Thousand ($530,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter there is hereby appropriated the sum of Five Hundred Forty Thousand ($540,000.00) Dollars;

Tennessee Preparatory School for the fiscal year beginning July 1, 1959, Five Hundred Sixty Thousand ($560,000.00) Dollars; and for the fiscal year beginning July 1,

1960, and each fiscal year thereafter there is hereby appropriated the sum of Five Hundred Ninety Thousand ($590,000.00) Dollars.

SECTION 27. *Be it further enacted,* That there is hereby appropriated the sum of Five Thousand ($5,000.00) Dollars, per annum, for the biennium 1959-61 to provide scholarships for the graduates and for upgrading the training of the faculty of the Tennessee School for the Blind; Five Thousand ($5,000.00) Dollars, per annum, for the biennium 1959-61 to provide scholarships for the graduates and for upgrading the training of the faculty of the Tennessee School for the Deaf; and Five Thousand ($5,000.00) Dollars, per annum, for the biennium 1959-61 to provide scholarships for the graduates and for upgrading the training of the faculty of the Tennessee Preparatory School. Such sums shall be used to provide said scholarships for such of these graduates as meet the qualifications as prescribed by the State Board of Education, and to upgrade the training of the faculty of said State institutions, under [fol. 258] policies adopted by the State Board of Education. Said graduates shall be selected by the State Commissioner of Education and the superintendents of the respective schools. Any graduates selected under the provisions of this section may continue to study any course in any school, or institution which he or she desires to attend, and which is approved by the State Commissioner of Education and the superintendent of the respective school. The upgrading of the training of the faculties shall be administered by the superintendents of the respective schools under the approval of the State Commissioner of Education.

SECTION 28. *Be it further enacted,* That there is hereby appropriated for the State Department of Education, for the fiscal year beginning July 1, 1959, the sum of One Million, Two Hundred Eighty-one Thousand, Five Hundred ($1,281,500.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter there is hereby appropriated the sum of One Million, Two Hundred Eighty-five Thousand, Five Hundred ($1,285,500.00) Dollars, which sums shall be used for the maintenance and operation of such department of education, including the

provision of administrative services for exceptional children; provided that out of the appropriations made in this section for the State Department of Education, an amount not to exceed Four Hundred Sixty-two Thousand, Five Hundred ($462,500.00) Dollars for the fiscal year beginning July 1, 1959, and an amount not to exceed Four Hundred Sixty-two Thousand, Five Hundred ($462,500.00) Dollars for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter, may be used to match, as required by Federal statute, funds appropriated and paid over by the Federal government under the National Defense Education Act of 1958.

[fol. 259] SECTION 29. *Be it further enacted,* That there is hereby appropriated for the Educational Television Commission for the fiscal year beginning July 1, 1959, Fifty Thousand ($50,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter there is hereby appropriated Fifty Thousand ($50,000.00) Dollars, to be expended under the provisions as set forth in Chapter 254 of the Public Acts of 1955.

SECTION 30. *Be it further enacted,* That for the operation and maintenance of various State colleges, there are hereby appropriated the following sums:

East Tennessee State College, Johnson City, for the fiscal year beginning July 1, 1959, One Million, One Hundred Twenty-eight Thousand ($1,128,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of One Million, Three Hundred Twenty Thousand ($1,320,000.00) Dollars;

Middle Tennessee State College, Murfreesboro, for the fiscal year beginning July 1, 1959, Nine Hundred Fifteen Thousand ($915,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of One Million, Seventy Thousand ($1,070,000.00) Dollars;

Memphis State University, Memphis, for the fiscal year beginning July 1, 1959, One Million, Two Hundred Thousand ($1,200,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there

is hereby appropriated the sum of One Million, Three Hundred Eighty-five Thousand ($1,385,000.00) Dollars;

[fol. 260] Tennessee Polytechnic Institute, Cookeville, for the fiscal year beginning July 1, 1959, One Million, Twenty-two Thousand ($1,022,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of One Million, One Hundred Thirty-five Thousand ($1,135,000.00) Dollars;

Austin Peay State College, Clarksville, for the fiscal year beginning July 1, 1959, Six Hundred Seventy-five Thousand ($675,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of Seven Hundred Ten Thousand ($710,000.00) Dollars;

Tennessee Agricultural & Industrial State University, Nashville, for the fiscal year beginning July 1, 1959, Two Million, Fifty Thousand ($2,050,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of Two Million, One Hundred Thousand ($2,100,000.00) Dollars.

It is the legislative intent and such is hereby expressed, that no part of the annual sum herein appropriated for the Tennessee Agricultural & Industrial State University at Nashville shall revert to the General Fund of the State at the end of any fiscal period. In the event that any amount of the annual sum herein appropriated shall remain unexpended and unobligated at the end of any fiscal period, such unexpended and unobligated amount shall be carried forward into the next fiscal period and shall be available to the said university.

Section 31. *Be it further enacted,* That for the purpose of providing an in-service training program to upgrade [fol. 261] the professional personnel of the State colleges and universities operating under the State Board of Education, and to upgrade the professional personnel of the University of Tennessee, operating under the board of trustees of the University of Tennessee, such State Board of Education and such board of trustees of the University of Tennessee are hereby authorized to allocate an in-service

training fund to each of the State colleges and universities operating under the respective control of each board; provided that the amount of each such in-service training fund shall be paid solely out of the State appropriations made to the respective State colleges and universities and expendable receipts; and provided further that the expenditures for the respective State colleges and universities operating under the State Board of Education shall be made only as approved by the State Commissioner of Education under policies adopted by the State Board of Education; and provided further that such expenditures for the University of Tennessee shall be made only as approved by the President of the University of Tennessee under policies adopted by the board of trustees of the University of Tennessee.

SECTION 32. *Be it further enacted,* That there is hereby appropriated for the University of Tennessee for the fiscal year beginning July 1, 1959, the sum of Nine Million, Three Hundred Thirty Thousand ($9,330,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter there is hereby appropriated the sum of Nine Million, Six Hundred Thirty Thousand ($9,630,000.00) Dollars out of the treasury of the State, to be expended as follows:

(1) For the maintenance, operation, and development of the University, for the fiscal year beginning July 1, 1959, [fol. 262] Seven Million, Five Hundred Thousand ($7,500,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, Seven Million Eight Hundred Thousand ($7,800,000.00) Dollars;

(2) For the Cooperative Agricultural Extension Work, for the fiscal year beginning July 1, 1959, Nine Hundred Eighty Thousand ($980,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, Nine Hundred Eighty Thousand ($980,000.00) Dollars;

(3) For the University of Tennessee Agricultural Experiment Stations, for the fiscal year beginning July 1, 1959, Seven Hundred Thousand ($700,000.00) Dollars; and

for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, Seven Hundred Thousand ($700,000.00) Dollars;

(4) For the University of Tennessee Municipal Technical Advisory Service, for the fiscal year beginning July 1, 1959, Fifty Thousand ($50,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, Fifty Thousand ($50,000.00) Dollars;

(5) For the University of Tennessee Memorial Research Hospital, for the fiscal year beginning July 1, 1959, One Hundred Thousand ($100,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, One Hundred Thousand ($100,000.00) Dollars.

The sum of Nine Hundred Eighty Thousand ($980,000.00) Dollars, per annum, for the Cooperative Agricultural Extension Work is appropriated as provided by Chapter 81 of the Public Acts of 1929 as codified in Tennes- [fol. 263] see Code Annotated as Sections 49-3401 through 49-3408. This appropriation is to be made in lieu of the continuing appropriations made by such Act, but the disbursements and management of said funds shall be, in all respects, governed by the provisions of the aforesaid Act, as codified in Tennessee Code Annotated.

No portion of the funds herein appropriated for the use and benefit of the University shall be used for the payment of interest upon any bonds which are the general obligation of the State.

SECTION 33. *Be it further enacted,* That there is hereby appropriated for the fiscal year beginning July 1, 1959, the sum of One Hundred Fifty Thousand ($150,000.00) Dollars; and for the fiscal year beginning July 1, 1960, and each fiscal year thereafter, there is hereby appropriated the sum of One Hundred Fifty Thousand ($150,000.00) Dollars for the Board of Control for Southern Regional Education, and such sums shall be used for the operation and maintenance of Meharry Medical College at Nashville, and for Regional Institutions for veterinary medical training, and for general expenses, as provided in the Compact for Southern Regional Education adopted by Tennessee and other

southern states on February 8, 1948, as amended, Sections 49-3601 through 49-3603 of Tennessee Code Annotated.

TEACHERS' RETIREMENT

SECTION 34. *Be it further enacted*, That there is hereby appropriated the following amounts for the Tennessee Teachers' Retirement System in keeping with the provisions of Chapter 29 of the Public Acts of 1945, as amended, [fol. 264] as codified in Sections 49-1501 through 49-1560, inclusive, of Tennessee Code Annotated, or as Sections 49-1501 through 49-1560, inclusive, of Tennessee Code Annotated may be amended:

	1959-60	1960-61
1. Retirement Accumulation Fund	$6,050,000.00	$6,210,000.00
2. Social Security Contributions	1,590,000.00	1,840,000.00
3. Minimum Benefit Fund	525,000.00	525,000.00
Total Teachers' Retirement	$8,165,000.00	$8,575,000.00

SECTION 35. *Be it further enacted*, That there is hereby appropriated the sum of Twenty-four Hundred ($2400.00) Dollars, per annum, for the biennium 1959-61 for the retirement pensions, Schools for the Deaf, Knoxville, which sum shall be expended as provided in Section 49-3109 of Tennessee Code Annotated.

SECTION 36. *Be it further enacted*, That there is hereby appropriated for the fiscal year beginning July 1, 1959, Twenty Thousand Nine Hundred ($20,900.00) Dollars, and for the fiscal year beginning July 1, 1960 and each fiscal year thereafter, Nineteen Thousand, Seven Hundred ($19,700.00) Dollars to provide the payment of monthly retirement allowance to certain aged teachers. Such sums shall be expended as provided in Section 49-1311 through 49-1312 of Tennessee Code Annotated.

[fol. 265] LIBRARY AND ARCHIVES

SECTION 37. *Be it further enacted,* That there is hereby appropriated the following amounts for the Tennessee State Library and Archives:

	1959-60	1960-61
1. Central Office	$250,000.00	$250,000.00
2. Public Libraries	25,000.00	25,000.00
3. Regional Libraries	300,000.00	300,000.00
4. Office of State Historian	30,000.00	12,500.00
5. Historical Commission	48,115.00	48,115.00
Total Library and Archives	$653,115.00	$635,615.00

EDUCATIONAL GRANTS-IN-AID

SECTION 38. *Be it further enacted,* That there is hereby appropriated for Educational Grants-in-Aid and for the National Employment Physically Handicapped for the fiscal year beginning July 1, 1959, Forty-one Thousand, Seventy-two ($41,072.00) Dollars; and for the fiscal year beginning July 1, 1960, and for each fiscal year thereafter Forty-one Thousand, Seventy-two ($41,072.00) Dollars, such appropriations to be expended under allotment of the State Budget Director to the following purposes: (a) Tennessee Academy of Science, (b) Scholarships, (c) Blind Girls Home, (d) National Employment Physically Handicapped, (e) State Aid to Youth, Inc., and (f) Spencer T. Hunt Trust Fund.

SECTION 39. *Be it further enacted,* That in the event revenues for the fiscal year ending June 30, 1959 from the tobacco tax and the sales and use tax exceed the total of One Hundred Nine Million ($109,000,000.00) Dollars, and [fol. 266] for the fiscal year ending June 30, 1960, the total of One Hundred Eleven Million, Two Hundred Thousand ($111,200,000.00) Dollars, as certified by the Comptroller of the Treasury; then that part of such excess as is earmarked for educational purposes, i.e., 96% of the tobacco tax, 80% of the two-thirds (2/3) of the sales and use tax, and 98½% of one-third (1/3) of the sales and use tax,

shall be made available in the subsequent fiscal year for the public school program, grades one through twelve, and for the state-supported special schools, colleges, and universities.

Such funds shall be distributed for the public school program, grades one through twelve, special State schools, and higher education on the percentage basis derived from the cost of such programs as set forth in the 1959-61 budget document of the State of Tennessee, this basis being for the year 1959-60, the sum of Eighty-four Million, Three Hundred Thousand ($84,300,000.00) Dollars for the minimum school program, grades one through twelve; One Million, Five Hundred Seventeen Thousand ($1,517,000.00) Dollars for special State schools; and Sixteen Million, Four Hundred Seventy Thousand ($16,470,000.00) Dollars for higher education, or a total of One Hundred Two Million, Two Hundred Eighty-seven Thousand ($102,287,000.00) Dollars, and the respective percentages shall be 82.42% for the public school program, grades one through twelve, 1.48% for special State schools, and 16.10% for higher education for the year 1959-60; and this basis being for the year 1960-61 the sum of Eighty-nine Million, Eight Hundred Thousand ($89,800,000.00) Dollars for the minimum school program; One Million, Five Hundred Sixty-seven Thousand ($1,567,000.00) Dollars for special State schools; and for higher education Seventeen Million, Five Hundred Thousand ($17,500,000.00) Dollars, or a total of [fol. 267] One Hundred Eight Million, Eight Hundred Sixty-seven Thousand ($108,867,000.00) Dollars; and the respective percentages shall be 82.49% for the public school program, grades one through twelve, 1.44% for special State schools, and 16.07% for higher education.

Any funds distributed under the provisions of this section to county, city, and special school districts shall be used by the respective boards of education exclusively to supplement teachers' salaries, provided that the Legislature may by local or private act divert such funds to other educational purposes, and provided further that in computing future salary increases, such sums as may be paid hereunder or such supplements shall not be treated as a part of the salary on which such increase shall be computed.

The funds allocated to county, city, and special school districts under the provisions of this section shall be distributed for the year 1959-60 on the basis of the average daily attendance of the year 1958-59, and shall be distributed for the year 1960-61 on the basis of the average daily attendance for the year 1959-60.

Any funds which may become available to state-supported special schools, colleges and universities under the provisions of this section may be used by the respective board of education or trustees for teachers' salaries, current operating expenses and for capital outlay, as may be determined by the said respective board.

Any county, city, and special school district board of education shall be and is hereby authorized and empowered, notwithstanding the provisions of any other law of this [fol. 268] state or any provisions of the contracts which the said board of education has executed with its employees, to increase the salaries of its employees after the beginning of or at any time during any school year, provided that in so doing it shall not exceed its budget as properly adopted or amended.

It is expressly provided that the funds distributed to counties, cities, and special school districts under the provisions of this section shall not be construed as local funds for meeting any local requirements of this Act; neither shall the amount of any salary increases which may be allowed to any teacher, principal, and superintendent, by reason of state funds distributed under the provisions of this section be construed to be an addition to the State salary schedule from local funds.

Such funds as may become available under this provision shall be certified by the State Comptroller of the Treasury on or about July 15, 1959 and July 15, 1960, respectively.

OTHER PROVISIONS

Section 40. *Be it further enacted,* That any amount of the appropriations made in Section 2, Section 14, and Section 15 of this Act for the first year of the biennium 1959-61, which shall be unexpended and unobligated at the close of business on June 30, 1960, shall be placed in a reserve

account in the general fund of the State; provided that as any of such amounts in said reserve account in the general fund of the State may be needed within the second year of the biennium, for the purposes for which said funds were originally appropriated, the State Director of the Budget, [fol. 269] with the approval of the Governor, may make such allotments out of such reserve account in the general fund which, when made, shall be added to the allotments made out of the respective appropriations for such purposes for the second year of the biennium 1959-61.

All appropriations made in this Act, notwithstanding any other provision hereof, are subject to the provisions of Chapter 33, Public Acts of 1937, as amended, as codified in Sections 9-601 through 9-612 of the Tennessee Code Annotated.

SECTION 41. *Be it further enacted,* That it is not the intention of the Legislature in enacting this Act to repeal by implication or to supersede or suspend any provision of Title 49 of Tennessee Code Annotated, or any other public law of this State as contained in Tennessee Code Annotated, except in cases of irreconcilable conflict. It is the legislative intention, hereby expressly declared, that all public laws of Tennessee dealing with the subject of education shall continue in full force and effect, except those statutes which are in irreconcilable conflict with the provisions of this Act.

SECTION 42. *Be it further enacted,* That effective July 1, 1959, Chapter 53, Public Acts of 1957, the caption of which is set forth in the caption hereof, and all other laws or parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SECTION 43. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases, or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, [fol. 270] it being the legislative intent now hereby declared that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

SECTION 44. *Be it further enacted,* That this Act shall take effect from and after July 1, 1959, except that Section 17 shall become effective from and after the date of the passage of this Act, the public welfare requiring it.

Passed: February 5, 1959.

JAMES L. BOMAR,
Speaker of the House of Representatives.

WM. D. BAIRD,
Speaker of the Senate.

Approved: February 13, 1959.

BUFORD ELLINGTON,
Governor.

[fol. 271] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

REFERENCES BY SOLICITOR GENERAL OF TENNESSEE TO ENTRIES IN SENATE AND HOUSE JOURNALS OF THE GENERAL ASSEMBLY OF TENNESSEE, RE: TAXES—Filed November 23, 1959

May It Please The Court:

The complainants allege, in effect, that unfair, discriminatory allocation of taxes has been brought about by non-apportionment. In essence, the complaint is that the rights of the more populous under-represented counties have been defeated by the combined action of the representatives of the less populous over-represented counties. The Senate and House Journals of the Tennessee General Assembly do not sustain this allegation.

The intervening complaint singles out Section 54-611, a portion of the Rural Roads Act, Chapter 46, Acts of 1955,

as illustrative of the allegation. This act was introduced in the General Assembly as House Bill No. 264. It was passed by the Senate by a vote of twenty-eight ayes and no noes. See Senate Journal, 79th General Assembly, 1955, [fol. 272] p. 452.

The act was passed by the House by a vote of eighty-one ayes, eleven noes. The eleven no votes were all by representatives from rural counties. See House Journal, 79th General Assembly, 1955, p. 466.

Another law singled out for particular criticism is the General Education Law, Chapter 14, Acts of 1959. This act was House Bill No. 123, and was passed by the Senate by a vote of thirty-three ayes, no noes. See Senate Journal, 81st General Assembly 1959, p. 350. (Since this journal has not been published, the certificate of John W. Cooke, Jr., Chief Clerk of the Senate, showing the foregoing, has been filed).

House Bill No. 123 passed the House by a vote of ninety-one ayes and six noes. Four of the representatives voting no were from rural counties. See certificate of L. Buchanan Loser, Chief Clerk of the House of Representatives of the 81st General Assembly, filed in this case.

The County Aid Fund law has been singled out for criticism. This law was Chapter 45, Public Acts of 1931. It was introduced in the Senate as Senate Bill No. 419. The published Senate Journal index contains no reference from which it can be ascertained by what vote it passed the Senate.

The bill passed the House by a vote of seventy-two ayes, twenty-one noes. Seven of the twenty-one noes were from [fol. 273] rural counties. See House Journal, 67th General Assembly, 1931, p. 1495.

Respectfully submitted,

Allison B. Humphreys, Solicitor General, 401 Seventh Avenue North, Nashville 3, Tennessee.

[fol. 274]

ATTACHMENT TO REFERENCES

SENATE CHAMBER
STATE OF TENNESSEE
NASHVILLE

JOHN W. COOKE, JR.
CHIEF CLERK
2321 SWEETWOOD ROAD
NASHVILLE, TENNESSEE

August 25, 1959

General Allison Humphreys
Supreme Court Building
Nashville, Tennessee

Dear General Humphreys:

I hereby certify that listed below is the third and final vote on House Bill No. 123 as recorded on page 350 of the 1959 Senate Journal.

"Thereupon, House Bill No. 123 passed its third and final reading by the following vote:

Ayes	33
Noes	0

Senators voting avy were: Messrs. Blackwell, Bockman, Boyers, Cash, Cobb, Coulter, Dement, Dennis, Doggett, Eblen, Fulton, Glover, Guffey, Haynes, Hughes, Hunt, Kelley, Knippers, Larkin, McGrath, McLemore, Mitchell (of Overton), Mitchell (of Shelby), Moore, Murray, Oakes, O'Brien, Padgett, Peters, Robinson, Sipes, Wilder and Mr. Speaker Baird—33.

A motion to reconsider was tabled."

Hoping that this is the desired information, I am

Sincerely yours,

/s/ JOHN W. COOKE, JR.

John W. Cooke, Jr.
Chief Clerk

JWCJr/ss

[fol. 275]

ATTACHMENT TO REFERENCES

WEDNESDAY, FEBRUARY 4, 1959
Thirty-first Day

House Bill No. 123—To Provide for operation, State Educational System.

The bill passed its third and final reading by the following vote:

AYES	91
NOES	6

Representatives voting aye were: Messrs. Adcock, Adcox, Aderhold, Akin, Allen, Atkin, Atkinson, Bagley, Bailey, Baird, Bales, Barry, Beard, Bell, Bertucci, Binkley, Brown (of Shelby), Bunn, Byrd, Caldwell, Carson, Chisolm, Clark, Crockarell, Cox (of Henry), Cox (of Washington), Cummings (of Cannon), Cummings (of Gibson), Damron, Davis (of Knox), Davis (of Rhea), Davis (of Hardeman), Doyle, Dunbar, Durham, Dyer, Evans, Fancher, Flippin, Givens, Gracey, Graham, Hamilton, Hanover, Hollingsworth, Jones, Kelley, Lambert, Lanier (of Dyer), Lanier (of Haywood), Lockert, McCammon, McCawley, McIlwain, Maddox, Mathis, Matthews, Moles, Morgan, Moriarty, Morton, Motlow, Murley, Nease, Parker, Patten, Peeler, Pellagrin, Pipkin, Pope, Price, Prince, Quillen, Rann, Rhinehart, Richardson, Roark, Senter, Sims, Smith (of Franklin), Smith (of Montgomery), Stiner, Taylor, Van Hersh, Walker, Wallace (of Madison), Wallace (of Marshall), Westbrooks, Wolfenbarger, Woodard and Mr. Speaker Bomar—91.

Representatives voting no were: Messrs. Bowers, Brown (of Knox), Crouch, Gammon, MacArthur and Oakley—6.

A motion to reconsider was tabled.

[fol. 276] CERTIFICATE

I, L. Buchanan Loser, Chief Clerk of the House of Representatives of the Eighty-first General Assembly of the State of Tennessee, do hereby certify that the foregoing is a full, true and correct copy of the roll call of the House of

Representatives of the Eighty-first General Assembly insofar as it pertains to the recording of the vote on third and final reading on House Bill No. 123—To Provide For Operation, State Educational System.

This, the 26th day of August, 1959.

Buchanan Loser, Chief Clerk, House of Representatives, Eighty-first General Assembly, State of Tennessee.

[fol. 277] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Title omitted]

MOTION TO AMEND AND SUPPLEMENT INTERVENING PETITION OF BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE—Filed December 2, 1959

Comes the intervening plaintiff, Ben West, Mayor of the City of Nashville, Tennessee, and respectfully moves the Court for the entry of an order permitting him to amend and supplement the intervening petition heretofore filed by him, by the filing as a part thereof the amendment and supplement to his petition hereto attached.

Robert H. Jennings, Jr., City Attorney for the City of Nashville.

Harris Gilbert, Denney, Leftwich & Osborn

[fol. 278] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 279] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES BAKER et al., Plaintiffs,

v.

JOE C. CARR et al., Defendants.

PER CURIAM OPINION—December 21, 1959

Before: Martin, Circuit Judge, and Boyd and Miller, District Judges.

Per Curiam. The original plaintiffs and intervening plaintiffs, citizens and qualified voters residing in different areas of Tennessee, seek to challenge in this action under the equal protection and due process clauses of the Fourteenth Amendment the existing legislative apportionment in Tennessee. Briefly summarized, the contentions of the plaintiffs[1] are as follows:

[fol. 280] The Constitution of Tennessee (Article 2, Sections 4, 5 and 6) directs the legislature at the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the members of the legislature among the several counties or districts according to the number of qualified voters therein. It provides for 99 members of the House of Representatives and 33 members of the Senate. Despite the mandatory requirements of the state constitution, no reapportionment has been enacted by the legislature since the Act of 1901, and even that Act was passed without the enumeration of voters required by the Constitution of the State. Although persistent demands have been made upon the legislature to

[1] In this opinion the term "plaintiffs" will include both the original plaintiffs and the intervening plaintiffs. After the original complaint was filed other parties were allowed to intervene as plaintiffs, including the Mayor of the City of Nashville.

reapportion the state for legislative purposes in accordance with the constitutional command, and although numerous bills have been introduced in the legislature to accomplish this purpose, the distribution of legislative seats remains as provided for in the Act of 1901. Such legislative distribution is grossly disproportionate to the distribution of population in the state, a condition brought about by shifts or changes in population since 1901. The inevitable result of this violation of the constitutional mandate is a gross inequality of legislative representation, a debasement of the voting rights of large numbers of citizens, and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. Illustrating the inequality, it is pointed out that a minority of approximately 37 per cent [fol. 281] of the voting population of the state now controls 20 of the 33 members of the Senate. It is further alleged that such inequality of representation has resulted in continuous and systematic legislative discrimination against the plaintiffs and others similarly situated with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power, notably funds for the support of the public schools, the maintenance of roads and highways and other purposes.

Named as defendants in the action are the Secretary of State, the Attorney General, the Co-Ordinator of Elections, and the Members of the State Board of Elections. No remedy is sought by the plaintiffs which would contemplate direct action against the state legislature or its members to require them to reapportion the legislative districts. Specifically, the plaintiffs request that the Court declare unconstitutional the legislative Reapportionment Act of 1901 as well as the Code provisions of Tennessee implementing that Act as being violative of the equal protection and due process clauses of the Fourteenth Amendment, and that the Court then either (a) require by injunction that the defendants take necessary steps to hold an election by means of which the members of the next legislature would be elected from the state at large without regard to counties [fol. 282] or districts, or (b) direct the defendants to hold an election by means of which the members of the legisla-

ture would be elected from counties and districts in accordance with the constitutional formula by applying mathematically the federal census of 1950.

The action is presently before the Court upon the defendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court.

The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. Colegrove v. Green, 328 U. S. 549; Cook v. Fortson and Turman et al. v. Duckworth, 329 U. S. 675; Colegrove v. Barrett, 330 U. S. 804; McDougal et al. v. Green, 335 U. S. 281; South et al. v. Peters, 339 U. S. 276; Remmey v. Smith, 342 U. S. 916; [fol. 283] Anderson v. Jordan, 343 U. S. 912; Kidd v. McCanless et al., 352 U. S. 920; Radford v. Gary, 352 U. S. 991.

In view of this array of decisions by our highest court, charting the unmistakable course which this Court must pursue in the instant case, it is unnecessary to consider decisions by lower federal courts. It is significant to point out that the case of Kidd v. McCanless, supra, involved the identical apportionment statutes and the identical state of facts with respect to apportionment of representatives in Tennessee, as the present action, the appeal in that case by the plaintiffs from the adverse decision of the Supreme Court of Tennessee being dismissed by the Supreme Court of the United States upon the authority of Colegrove v. Green, supra, and Anderson v. Jordan, supra. Moreover, the facts in the recent case of Radford v. Gary, supra, decided February 25, 1957, are substantially parallel to the facts of the present case. The plaintiffs attacked the existing legislative apportionment in Oklahoma, alleging inequalities in legislative representation and a consequent

violation of the equal protection clause of the Fourteenth Amendment. The relief sought was not only a mandatory injunction against the members of the legislature, but in the alternative that the members of the legislature be elected at large until constitutional reapportionment could be effected. A three-judge federal district court dismissed the action (Radford v. Gary, 145 F. Supp. 541) and the Supreme Court of the United States affirmed the judgment [fol. 284] of the district court by a per curiam opinion upon the authority of Colegrove v. Green, supra, and Kidd v. McCanless, supra. The Court can find no way in the present case to escape the compelling authority of this ruling as well as the other rulings of the Supreme Court herein cited.[2]

The wisdom and soundness of the non-intervention rule consistently followed by the Supreme Court are strikingly pointed up when the question of an appropriate judicial remedy is considered. As stated, the plaintiffs do not even insist that the Court could or should take any direct action against the legislature itself, by mandamus or otherwise, to compel the individual members of the legislature to perform their constitutional duties to reapportion the state legislative seats. The suggested remedies are indirect in character. Kidd v. McCanless, 200 Tenn. 273, affirmed by the Supreme Court of the United States in Kidd v. McCanless, supra, holds that a declaration of unconstitutionality of the existing apportionment statute of Tennessee, without more, would result in a destruction of the state government [fol. 285] itself, since the de facto doctrine would not be applicable to maintain the present members of the legislature in office and there would be no prior valid apportionment act to fall back upon. In view of this decision, the plaintiffs recognize that the Court, if it declared the existing apportionment statute unconstitutional, would be required to go further and devise an appropriate remedy so as to avoid a disruption of state government. However, the

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[2] The duty of the court to refuse intervention is not changed by allegations to the effect that various tax proceeds are allocated upon a discriminatory basis. Even if such general allegations could be accepted as showing specific results of existing legislative apportionment, they do not change the essential character of the controversy or the fundamental bases of the Supreme Court rulings refusing intervention.

remedies suggested by the plaintiffs are neither feasible nor legally possible.

The alternative of an election at large is met with a number of insuperable objections. First, the Constitution of Tennessee specifically provides for the election of members of the legislature from counties and districts, and no provision whatever is made for a legislature composed of members elected at large.[2] It is true that the Constitution provides that the legislature of the state is "dependent upon the people" but the power to direct an election at large cannot be inferred from such general language in the face of specific provisions for election from districts. Practical considerations also are heavily weighted against such a remedy. It would lead to serious geographical inequalities [fol. 286] and other discriminations, probably to a greater extent than those presently existing. It would require the Court not only to provide for the supervision of the entire election but also to devise detailed rules and regulations under which such election should be held, a task which the courts are not equipped to undertake. Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate. An election at large, directed by the Court, would indeed inject the Court into a "political thicket", as stated in Colegrove v. Green, supra.

Equally objectionable would be an election held on the basis of an enumeration of voters in the various counties and districts of the state determined by the Court by applying the last federal census. The Constitution of the state vests the duty of making the enumeration in the legislature and not in the courts. Moreover, the redistricting of the state is required to be based upon an enumeration of the qualified voters and not upon population alone. The Court would have no way of knowing the number of qualified voters in the various districts. Such a remedy would con-

[2] Smiley v. Holm, 285 U. S. 355, and Koenig v. Flynn, 285 U. S. 375, relied on by plaintiffs for ordering an election at large, both dealt with the election of congressional representatives under a federal act providing for the election of representatives at large under certain conditions, and these cases are not in point here.

stitute the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state. [fol. 287] It is strenuously argued by the plaintiffs that the case alleged in the complaint is one involving a clear violation of their individual rights guaranteed by the Fourteenth Amendment, and for this reason that the Court should in some way overcome its reluctance to intervene in matters of a local political nature and formulate a remedy which would adequately protect their rights. It is insisted that the wrong committed against them by the failure and refusal of the state legislature to abide by the state constitution is clear and unmistakable and that the courts should not leave such wrong without a remedy. With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. Some examples of such rights not appropriate for judicial relief were set forth by Mr. Justice Frankfurter in his opinion in Colegrove v. Green, supra:

> "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' [fol. 288] Art. IV, Sec. 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson*, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to

depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." (p. 556)

Being of the opinion that the Court has no right to intervene or to grant the relief prayed for, it is unnecessary to discuss the further ground of the motion that the action must fail because of the non-joinder of indispensable parties as defendants.

An order will be submitted dismissing the action in accordance with this opinion.

John D. Martin, United States Circuit Judge; Marion S. Boyd, William E. Miller, United States District Judges.

[fol. 289] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES BAKER, et al., Plaintiffs,

vs.

JOE C. CARR, et al., Defendants.

ORDER DISMISSING COMPLAINT—February 4, 1960

This cause was heard on the original complaint, the intervening petitions and the amended intervening petition of Ben West, Mayor of the City of Nashville, in accordance with the per curiam opinion heretofore filed; in conformity with said per curiam opinion the first two grounds of defendants' motion to dismiss (1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, are

sustained, defendants' motion to dismiss is granted, and the complaint is hereby dismissed.

Enter, this 4 day of February, 1960.

John D. Martin, United States Circuit Judge; Marion S. Boyd, William E. Miller, United States District Judges.

Approved for Entry:

Denney, Leftwich & Osborn, For all Plaintiffs and Intervenors.

[fol. 290]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ORDER ALLOWING CITY OF KNOXVILLE AND CITY OF CHATTANOOGA TO INTERVENE AS PARTIES PLAINTIFF; ALSO ALLOWING CITY OF NASHVILLE TO AMEND AND SUPPLEMENT PETITION, ETC.—March 22, 1960

This case came on further to be heard at the direction of the Honorable William E. Miller, District Judge for the Middle District of Tennessee, on this 26th day of February, 1960, it having theretofore appeared to the Court that no Orders had been entered respecting the Motion of Ben West, Mayor of the City of Nashville, for leave to amend and supplement his intervening petition, which amended and supplemental intervening petition had been lodged with the Clerk and by the Clerk distributed to the District Judges assembled for the hearing of the cause, and further that no Order had been entered with respect to the Petitions filed by the City of Knoxville, Tennessee and the City of Chattanooga, Tennessee, for leave to intervene as parties plain-
[fol. 291] tiff. Whereupon, the Court heard argument of counsel and particularly the objections of the attorneys for the defendants to the entry of any Order whereby said

amended and supplemental intervening petition of the said Ben West or the petitions for permission to intervene of said cities might be made a part of the record in this cause, first that as a matter of law, any action with respect to said amended and supplemental intervening petition and said petitions to intervene as plaintiffs came too late, and second, that the things and matters pleaded in said amended and supplemental petition were immaterial. And it appearing to the three-judge District Court assembled for the hearing of the original and intervening plaintiffs, that the objections made by the defendants are not well taken and should be overruled and that the original and intervening parties plaintiff are entitled to have, as a part of the record herein, said amended and supplemental petition and an Order reflecting the allowance of the petition of said cities to intervene as parties plaintiff, it is,

Ordered, Adjudged and Decreed that Ben West, Mayor of Nashville, intervening plaintiff, be and he is hereby permitted to file and make a part of the record herein, that amended and supplemental petition heretofore filed and exhibited to his Motion for leave to amend and supplement his petition, and it is further ordered that the City of Knoxville, Tennessee, and the City of Chattanooga, Tennessee, be and they are hereby made and constituted parties plaintiff in this cause. It is further ordered that the Motion to [fol. 292] Dismiss heretofore filed on behalf of the defendants, be and the same is hereby permitted to stand as a motion to dismiss to the said amended and supplemental petition and the petitions to intervene on behalf of said cities and, it appearing to the Court that the additional matters pleaded and the rights of the additional parties hereby allowed are sufficiently treated in that per curiam opinion filed by this Court on December 21, 1959, and that further hearing of the plaintiffs is in no wise warranted by the action herein taken, it is further Ordered, Adjudged and Decreed that the plaintiff's cause be and the same is hereby dismissed, all as heretofore provided in an Order of Dismissal entered in this cause on February 4, 1960.

Enter, this 22nd day of March, 1960.

John D. Martin, United States Circuit Judge; Marion S. Boyd, William E. Miller, United States District Judges.

O. K. for Entry:

Denney, Leftwich & Osborn, Attorneys for Plaintiff.
George F. McCanless, Attorney General, for the defendants.

[fol. 293] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE—Filed March 22, 1960

Leave of Court first having been obtained, Ben West, Mayor, City of Nashville, Tennessee, on behalf of himself individually and on behalf of the residents of Nashville, Davidson County, Tennessee, and said City, herewith amends and supplements his intervening petition in the following particulars:

I.

By adding to the VIII Section of said intervening petition, wherein the relief prayed and described is set forth, the following:

"Title 28, Section 2201, United States Code Annotated, reads as follows:

"'*Creation of remedy.* In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon [fol. 294] the filing of an appropriate pleading, may

declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.'

"For the fact that the Apportionment Act of 1901, Sections 3-101 to 3-109, of the Tennessee Code Annotated, in effect repealed or nullified Sections 4, 5 and 6 of Article 2 of the Constitution of Tennessee providing for apportionment of representatives and senators among the qualified voters of Tennessee, and, for the fact that those thirty General Assemblies elected pursuant to said Apportionment Act of 1901 have consistently rejected all Acts and Bills providing for an apportionment of membership in the General Assembly in accordance with said Sections of the Constitution of Tennessee systematically enforcing upon the plaintiff and those similarly situated the provisions of said Apportionment Act of 1901, and in effect working a repeal of that constitutional provision requiring an apportionment of seats in the General Assembly within every term of ten years, whereby the plaintiffs and those similarly situated are deprived of the equal protection of the laws and of the right to free and equal suffrage as guaranteed by the United States Constitution, the plaintiff is entitled to a declaration of his rights and other legal relations to the defendants, and particularly whether said Apportionment Act of 1901 is constitutional 'whether or not further relief is or could be sought.'"

[fol. 295] II.

And the intervening plaintiff supplements and amends Section XXII of his intervening petition by adding the following paragraph:

"The direct relationship between excess representation in the unlawfully constituted General Assembly of Tennessee and the obtaining of an excess share in the monies collected by the State of Tennessee in the exercise of its power to tax, and the converse, the direct

relationship between the lack of proportionate representation in the General Assembly and the bearing of an excessive and disproportionate share of the expense of Government is demonstrated by certain statistical material prepared at the direction of the intervening plaintiff by the Advanced Planning Division of the Planning Commission of the City of Nashville herewith exhibited. Exhibit No. 4 attached hereto and made a part hereof (Exhibit No. 2 filed to the intervening petition consisted of an exhaustive history of the systematic refusal of the General Assembly to reapportion representation in the General Assembly) lists those Counties given an excess of direct representation in the Tennessee House of Representatives by the Apportionment Act of 1901, as reflected by the Twelfth Census of the United States taken in the year 1900; it lists those Counties having and given excess representation as reflected by the Thirteenth Census of the United [fol. 296] States, taken in the year 1910, and those Counties having excess representation under said Act, as reflected by the Census of the United States population taken in 1950. As shown by said Exhibit, population changes and certain amendments to the Act of 1901 by the year 1950 found twenty-three Counties possessed of twenty-five direct representatives, when their voting population would have entitled them to but two direct representatives. Exhibit No. 5 herewith attached and made a part hereof, lists those Counties having a deficiency of direct representatives according to the number of their qualified voters, as reflected by those same Census reports, for the years 1900, 1910 and 1950. As of the year 1950, those ten Counties, including the County of Davidson in which your intervening petitioner resides, although entitled to forty-five direct representatives under the constitutional formula, actually had but twenty direct representatives. Exhibit No. 6 tabulates the amendments made to the Apportionment Act of 1901 in the intervening fifty-eight years, reflecting the further disrespect of the Legislature for the constitutional formula. Exhibit No. 7 attached hereto reflects the disparity in voting population in the sena-

torial districts established by the Act of 1901, and its unconstitutionality when enacted and as applied to the voting population of Tennessee, as reflected by the Census of 1950. Exhibit No. 8 attached hereto shows [fol. 297] the treatment of the educational funds of the State of Tennessee by that unlawfully constituted General Assembly. Those twenty-three Counties listed in Exhibit No. 4, and shown to have twenty-three direct representatives to which, by the constitutional formula, said Counties are not entitled, receive the sum $152.25 per pupil on the basis of the average daily attendance in their schools, whereas those ten Counties having twenty direct representatives, but entitled to twenty-five additional direct representatives according to the constitutional formula, receive but $107.52 per pupil, based on the average daily attendance of pupils in their school sytems. The average for all pupils in the State is $129.90; on this basis, those twenty-three overrepresented Counties receive 17.21% more State aid than the formula would allow, and those ten underrepresented Counties collectively receive 20.81% less than the formula would allow for them. Exhibit No. 9 attached hereto and made a part hereof reflects of the treatment of the citizens of Tennessee by that unlawfully constituted General Assembly in the division of the State Gasoline and Motor Fuel Tax monies among the Counties of the State. This Exhibit again compares the effect of over-representation in the Legislature, and the effect of under-representation in the State Legislature, showing that those twenty-three Counties [fol. 298] having twenty-three more direct representatives than the constitutional formula entitles them to, receive per motor vehicle registered the average sum $28.98, whereas those ten Counties lacking twenty-five direct representatives to which the constitutional formula would entitle them, receive but $6.10 per motor vehicle registered in their Counties. Distribution of this fund is also reflected on the basis of population of said over-represented and said under-represented Counties; on that basis said over-represented Counties receive $9.19 per capita from the funds stated, while

the under-represented Counties receive but $2.46 per capita from the fund, while the average for all Counties in the State is $5.82 per capita. Exhibit No. 10 shows in map form the apportionment of seats in the House of Representatives under said Act of 1901, as of that year; Exhibit No. 11 shows the apportionment of seats in the House of Representatives as of the year 1951 under said Act as amended. Exhibit No. 12 shows the apportionment of seats in the Senate of Tennessee in map form."

III.

Wherefore, the intervening plaintiff prays for relief as set forth in his intervening complaint.

Ben West, Mayor of Nashville.

Robert H. Jennings, Jr., City Attorney for the City of Nashville; Harris Gilbert, Denney, Leftwich & Osborn, Special Counsel to City Attorney.

[fol. 299]

EXHIBIT 4 TO AMENDMENT

(See opposite) ☞

[fol. 299]

Exhibit 4 to Amendment

COUNTIES HAVING AN EXCESS OF DIRECT REPRESENTATIVES ACCORDING TO 1900 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 - 1901 TENNESSEE GENERAL ASSEMBLY

COUNTY	1900 VOTING POPULATION*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Cannon	2,781	.5649	0	1
Gibson	9,466	1.9288	1	2
Jackson	3,178	.6455	0	1
Madison	8,756	1.7786	1	2
Overton	2,925	.5941	0	1
White	3,118	.6333	0	1
		TOTAL	2	7

$$\text{Ratio} = \frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$$

Total Tennessee Voting Population in 1900 was 487,380.*

* 12th Census of the United States, Taken in the Year 1900, Population, Part II, Table 26, pp. 202 - 203.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

COUNTIES HAVING AN EXCESS OF DIRECT REPRESENTATIVES ACCORDING TO 1910 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 - 1911 TENNESSEE GENERAL ASSEMBLY

COUNTY	1910 VOTING POPULATION*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Cannon	2,634	.4718	0	1
DeKalb	3,642	.6524	0	1
Gibson	10,385	1.8603	1	2
Jackson	3,282	.5879	0	1
Madison	10,024	1.7956	1	2
Maury	10,703	1.9172	1	2
Overton	3,654	.6542	0	1
Stewart	3,448	.6176	0	1
White	3,629	.6501	0	1
		TOTAL	3	12

$$\text{Ratio} = \frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$$

Total Tennessee Voting Population in 1910 was 552,668.*

* 13th Census of the United States, Taken in the Year 1910, Population, Vol. III, Tennessee, Table I, pp. 745 - 761.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

[fol. 301]

COUNTIES HAVING AN EXCESS OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 - 1951 TENNESSEE GENERAL ASSEMBLY

COUNTY	1950 VOTING POPULATION*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Cannon	5,341	.2672	0	1
Chester	6,391	.3198	0	1
Claiborne	12,799	.6404	0	1
Cocke	12,572	.6291	0	1
Crockett	9,676	.4842	0	1
DeKalb	6,984	.3495	0	1
Dickson	11,294	.5651	0	1
Gibson	48,132	1.4927	1	2
Hardin	16,908	.4792	0	1
Hickman	7,598	.3802	0	1
Jackson	6,719	.3362	0	1
Lake	6,252	.3128	0	1
McNairy	11,601	.5805	0	1
Madison	37,245	1.8636	1	2
Marion	10,988	.5503	0	1
Marshall	11,288	.5648	0	1
Monroe	12,884	.6447	0	1
Moore	2,340	.1171	0	1
Overton	9,474	.4740	0	1
Sevier	12,793	.6401	0	1
Smith	8,731	.4369	0	1
Stewart	5,238	.2621	0	1
White	9,244	.4625	0	1
		TOTAL	2	25

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$

Total Tennessee Voting Population in 1950 was 1,978,548.*

* U. S. Census of Population: 1950. Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 42, pp. 92 - 97

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

[fol. 302]

EXHIBIT 5 TO AFFIDAVIT

COUNTIES HAVING A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1900 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 - 1901 TENNESSEE GENERAL ASSEMBLY

COUNTY	1900 VOTING POPULATION*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Anderson	4,130	.8597	1	0
Bradley	3,487	.7459	1	0
Campbell	3,976	.8506	1	0
Carter	3,748	.7613	1	0
Grainger	3,574	.7264	1	0
Henry	4,080	.8227	1	0
Jefferson	4,134	.8889	1	0
Lawrence	3,720	.7577	1	0
Marion	4,066	.8599	1	0
Rhea	3,405	.6916	1	0
Shelby	42,843	8.9057	8	7
		TOTAL	18	7

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$

Total Tennessee Voting Population in 1900 was 487,280. *

* 12th Census of the United States, Taken in the Year 1900, Population, Part II, Table 32, pp. 202 - 203.

** Formula according to Art. II, Sec. 5, Tennessee State Constitution.

[fol. 303]

COUNTIES HAVING A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1910 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 – 1961 TENNESSEE GENERAL ASSEMBLY

COUNTY	1910 VOTING POPULATION*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Anderson	4,169	.7344	1	0
Bailey	3,845	.6898	1	0
Campbell	6,354	1.1609	1	0
Carter	4,488	.7909	1	0
Davidson	43,707	7.4710	7	6
Hamilton	25,368	4.5465	4	3
Jefferson	4,259	.7541	1	0
Knox	24,881	4.4636	4	3
Lawrence	4,259	.7508	1	0
Shelby	60,095	10.7649	10	7
		TOTAL	31	19

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$

Total Tennessee Voting Population in 1910 was 582,698.*

* 13th Census of the United States, Taken in the Year 1910, Population, Vol. III, Tennessee, Table I, pp. 785 – 787.

** Formula according to Art. II, Sec. 5, Tennessee State Constitution.

[fol. 304]

COUNTIES HAVING A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION* AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5 - 1951 TENNESSEE GENERAL ASSEMBLY

COUNTY	1950 VOTING POPULATION *	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL NUMBER OF DIRECT REPRESENTATIVES
Anderson	33,990	1.7887	1	0
Bradley	18,273	.9143	1	0
Campbell	17,477	.8745	1	0
Carter	23,303	1.1660	1	0
Davidson	211,930	10.6043	10	6
Hamblen	14,090	.7050	1	0
Hamilton	131,971	6.6034	6	3
Knox	140,559	7.0331	7	3
Shelby	312,345	15.6287	15	7
Sullivan	55,712	2.7876	2	1
		TOTAL	45	20

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$

Total Tennessee Voting Population in 1950 was 1,978,548. *

* U. S. Census of Population: 1950. Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 42, pp. 92 - 97.

** Formula according to Art. II, Sec. 5, Tennessee State Constitution.

[fol. 305]

Exhibit 6 to Amendment

COUNTIES RECEIVING A DIRECT REPRESENTATIVE IN A TENNESSEE GENERAL ASSEMBLY MEETING BETWEEN 1901 AND 1959

COUNTY	YEAR RECEIVED DIRECT REPRESENTATIVE	VOTING POPULATION NEAREST PREVIOUS U. S. CENSUS	NEAREST PREVIOUS U. S. CENSUS	MINIMUM VOTING POPULATION REQUIRED FOR ONE DIRECT REPRESENTATIVE*
Marion	1919	4,785	1910	3,722
Chester	1935	2,714	1930	9,549
Lake	1941	3,306	1940	11,500
Moore	1945	1,222	1940	11,500

* According to Art. II, Sec. 5 of the Tennessee State Constitution, for a county to receive one direct representative, such county must have a voting population equal to not less than two-thirds of the ratio derived by dividing the total state voting population by the total number of representatives (99) in the House of the Tennessee General Assembly.

Sources:

Thirteenth Census of the United States, Taken In The Year 1910, Population, Volume III, Tennessee, Table I, pp. 745 - 761.

Fifteenth Census of the United States: 1930; Population Bulletin, Second Series, Tennessee, Table 4, page 6 and Table 13, page 23.

Sixteenth Census of the United States: 1940; Population, Second Series; Table 10, page 20 and Table 21, pages 42 and 43.

$$\text{Ratio} = \frac{\text{county voting population} \times 99}{\text{total state voting population nearest previous census}}$$

$$\text{Marion} = \frac{4{,}785 \times 99}{552{,}668} = .8571$$

$$\text{Chester} = \frac{2{,}714 \times 99}{1{,}418{,}144} = .1895$$

$$\text{Lake} = \frac{3{,}306 \times 99}{1{,}707{,}760} = .1917$$

$$\text{Moore} = \frac{1{,}222 \times 99}{1{,}707{,}760} = .0708$$

[fol. 306]

Exhibit 7 to Amendment

TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950

SENATORIAL DISTRICT NUMBER	COUNTIES	TOTAL VOTING POPULATION 1900	VOTING POPULATION PER SENATOR 1900	TOTAL VOTING POPULATION 1950	VOTING POPULATION PER SENATOR 1950
1	Carter	3,748		23,303	
	Greene	6,967		23,649	
	Johnson	2,211		6,649	
	Unicoi	1,320		8,787	
	Washington	5,408		36,967	
			19,654		99,355
2	Hawkins	5,172		16,900	
	Sullivan	6,089		55,712	
			11,251		72,612
3	Campbell	3,976		17,477	
	Claiborne	4,559		12,799	
	Grainger	3,576		7,125	
	Hancock	2,274		4,710	
	Morgan	*		8,308	
	Scott	2,378		8,417	
	Union	2,841		4,600	
			19,604		63,436
4	Blount	4,359		30,353	
	Cocke	4,072		12,572	
	Hamblen	2,997		14,090	
	Jefferson	4,130		11,359	
	Sevier	4,434		12,793	
			19,992		81,167
5	Knox	19,049	14,130 **	140,559	102,726 **
6	Knox	19,049		140,559	
	Anderson	*		33,990	
	Loudon	2,467		13,264	
	Roane	*		17,639	
	Monroe	4,065		*	
	Polk	2,679		*	
			14,130 **		102,726 **
7	Anderson	4,130		*	
	Roane	5,470		*	
	Bradley	3,687		18,273	
	McMinn	4,278		18,347	
	James	1,281		*	
	Polk	*		7,330	
	Monroe	*		12,884	
			18,846		56,834
8	Hamilton	16,892	16,892	131,971	131,971

* County is in another district for the year indicated.

** In cases where a county has both a direct and floaterial senator, the sum of the voting population of all the counties in such floaterial district is divided by the number of direct and floaterial districts involved to determine the average population for each district.

[fol. 307]

TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950 (CONT.)

SENATORIAL DISTRICT NUMBER	COUNTIES	TOTAL VOTING POPULATION 1900	VOTING POPULATION PER SENATOR 1900	TOTAL VOTING POPULATION 1950	VOTING POPULATION PER SENATOR 1950
9	Bledsoe	1,490		4,198	
	Cumberland	2,237		9,593	
	Meigs	1,604		3,039	
	Rhea	3,405		8,937	
	Sequatchie	766		2,904	
	Van Buren	700		2,039	
	White	3,118		9,244	
			13,320		39,954
10	Clay	1,853		4,528	
	Fentress	1,331		7,057	
	Jackson	3,178		6,719	
	Morgan	2,544		*	
	Overton	2,925		9,474	
	Pickett	1,135		2,565	
	Putnam	3,679		17,071	
			16,645		47,414
11	Franklin	4,686		14,297	
	Grundy	1,737		6,540	
	Marion	4,066		10,998	
	Warren	3,804		13,337	
			14,293		45,172
12	Cannon	2,781		5,341	
	DeKalb	3,656		6,984	
	Rutherford	7,677		25,316	
			14,114		..,641
13	Smith	4,372		8,731	
	Wilson	6,550		16,459	
			10,922		25,190
14	Macon	2,938		7,974	
	Sumner	6,394		20,143	
	Trousdale	1,482		3,351	
			10,814		31,468
15	Montgomery	8,712		26,284	
	Robertson	6,274		16,456	
			14,986		42,740
16	Davidson	33,311		211,930	
			16,656		105,965
17	Davidson	33,311		211,930	
			16,656		105,665
18	Bedford	5,777		14,732	
	Coffee	3,720		13,406	
	Moore	1,333		2,340	
			10,830		30,478

* County is in another district for the year indicated.

[fol. 308]

TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950 (CONT.)

SENATORIAL DISTRICT NUMBER	COUNTIES	TOTAL VOTING POPULATION 1900	VOTING POPULATION PER SENATOR 1900	TOTAL VOTING POPULATION 1950	VOTING POPULATION PER SENATOR 1950
19	Lincoln	6,229		15,092	
	Marshall	4,591	10,820	11,388	26,480
20	Lewis	1,075		3,413	
	Maury	11,286		24,556	
	Perry	1,957	14,318	3,711	31,680
21	Cheatham	2,467		5,263	
	Hickman	3,891		7,598	
	Williamson	6,271	12,629	14,064	26,925
22	Giles	7,565		15,935	
	Lawrence	3,730		15,847	
	Wayne	2,974	14,269	7,176	38,958
23	Dickson	4,402		11,294	
	Humphreys	3,203		6,588	
	Houston	1,545		3,084	
	Stewart	3,512	12,662	5,238	26,204
24	Carroll	5,804		16,472	
	Henry	5,873	11,677	15,465	31,937
25	Chester	2,372		6,391	
	Henderson	4,050		10,199	
	Madison	8,756	15,178	37,245	53,835
26	Benton	2,712		7,023	
	Decatur	2,356		5,563	
	Hardin	4,357		9,577	
	Hardeman	5,119		13,565	
	McNairy	4,060	18,604	11,601	47,329
27	Gibson	9,466	9,466	29,832	29,832
28	Lake	1,972		6,252	
	Obion	7,173		18,444	
	Weakley	7,862	17,007	18,007	42,703

TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950 (CONT.)

SENATORIAL DISTRICT NUMBER	COUNTIES	TOTAL VOTING POPULATION 1900	VOTING POPULATION PER SENATOR 1900	TOTAL VOTING POPULATION 1950	VOTING POPULATION PER SENATOR 1950
29	Crockett	3,556		9,676	
	Dyer	5,935		20,062	
	Lauderdale	5,075	14,566	14,413	44,151
30	Tipton	6,970		15,944	
	Shelby	43,843	16,938 **	312,345	109,430 **
31	Haywood	5,447		13,934	
	Fayette	6,180	11,627	13,577	27,511
32	Shelby	43,843	16,938 **	312,345	109,430 **
33	Shelby	43,843	16,938 **	312,345	109,430 **

** In cases where a county has both a direct and floaterial senator, the sum of the voting population of all the counties in such floaterial district is divided by the number of direct and floaterial districts involved to determine the average population for each district.

[fol. 309]

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NOTE: Assuming the forty-three counties are apportioned only on the basis of the voting population, in 1900 each district should have a population of 14,709 and in 1950 a population of 39,184. Using the above assumptions, the results of the 1901 and the 1951 Senate apportionment follows below.

	Districts having less than 90% of the Required Population (Over Represented)	Districts having more than 110% of the Required Population (Under Represented)
1900	10	12
1950	19	11

[fol. 311]

Exhibit 8 to Amendment

STATE AID FOR EDUCATION FOR FISCAL YEAR 1957-58 SHOWING TOTAL AID TO ALL SCHOOL SYSTEMS WITHIN A COUNTY AND AVERAGE STATE AID PER PUPIL IN AVERAGE DAILY ATTENDANCE FOR 1957-58

COUNTY	TOTAL AID FOR EDUCATION 1957-58	TOTAL PUPILS IN A.D.A. 1957-58	STATE AID PER A.D.A. PUPIL 1957-58
Anderson	$ 1,072,910	7,638	$ 140.47
Bedford	680,794	4,746	143.45
Benton	393,956	2,220	177.46
Bledsoe	355,137	1,870	189.91
Blount	1,823,219	13,793	132.18
Bradley	951,561	7,760	122.62
Campbell	1,079,792	7,866	137.27
Cannon	326,345	1,930	169.09
Carroll	862,072	5,343	161.35
Carter	1,353,684	9,733	139.08
Cheatham	325,031	1,957	166.09
Chester	359,344	2,041	176.06
Claiborne	775,104	4,874	159.03
Clay	338,136	1,839	183.87
Cocke	696,026	5,115	136.08
Coffee	912,195	6,134	148.71
Crockett	623,803	3,962	157.45
Cumberland	733,766	4,567	160.67
Davidson	6,118,723	60,566	101.03
Decatur	369,028	1,909	193.31
DeKalb	373,391	2,163	172.63
Dickson	595,595	3,995	149.09
Dyer	816,277	6,443	126.69
Fayette	783,920	5,859	133.80
Fentress	561,082	3,005	186.72
Franklin	781,109	5,478	142.59
Gibson	1,388,383	9,621	144.31
Giles	788,163	5,147	153.13
Grainger	368,731	2,619	140.79
Greene	1,225,599	8,575	142.93
Grundy	437,864	2,680	163.38
Hamblen	830,033	6,194	134.01
Hamilton	4,640,955	43,599	106.45
Hancock	284,147	1,764	161.08
Hardeman	737,553	4,903	150.43
Hardin	678,132	3,927	172.68
Hawkins	921,369	6,888	133.76
Haywood	812,204	5,781	140.50
Henderson	569,405	3,350	169.97
Henry	673,472	4,254	158.31
Hickman	406,737	2,488	163.48
Houston	222,403	1,068	208.24
Humphreys	450,421	2,512	179.31
Jackson	374,059	2,087	179.23
Jefferson	580,795	4,097	142.49
Johnson	429,290	2,440	175.94

[fol. 312]

STATE AID FOR EDUCATION FOR FISCAL YEAR 1957-58 SHOWING TOTAL AID TO ALL SCHOOL SYSTEMS WITHIN A COUNTY AND AVERAGE STATE AID PER PUPIL IN AVERAGE DAILY ATTENDANCE FOR 1957-58 (CONT.)

COUNTY	TOTAL AID FOR EDUCATION 1957-58	TOTAL PUPILS IN A.D.A. 1957-58	STATE AID PER A.D.A. PUPIL 1957-58
Knox	$ 4,943,717	45,062	$ 109.71
Lake	286,475	2,094	136.81
Lauderdale	838,554	5,719	146.63
Lawrence	873,937	6,046	144.55
Lewis	270,598	1,367	197.95
Lincoln	764,015	5,161	148.04
Loudon	689,376	5,452	126.44
McMinn	945,507	7,393	127.89
McNairy	775,233	4,677	165.75
Macon	407,498	2,486	163.92
Madison	1,591,829	12,307	129.34
Marion	649,901	5,001	129.95
Marshall	496,176	3,440	144.24
Maury	1,197,095	8,808	135.91
Meigs	244,542	1,335	183.18
Monroe	816,941	5,580	146.41
Montgomery	1,199,011	8,271	144.97
Moore	171,957	780	220.46
Morgan	601,919	3,744	160.77
Obion	809,129	5,609	144.26
Overton	599,156	3,321	180.41
Perry	246,829	1,201	205.52
Pickett	221,302	976	226.74
Polk	425,231	3,042	139.79
Putnam	826,354	5,752	143.66
Rhea	476,006	3,463	137.45
Roane	1,160,847	9,162	126.70
Robertson	759,203	5,345	142.04
Rutherford	1,267,800	8,837	143.46
Scott	742,111	4,601	161.29
Sequatchie	242,073	1,428	169.52
Sevier	852,308	5,429	156.99
Shelby	10,185,532	106,262	95.85
Smith	383,612	2,528	151.75
Stewart	360,403	1,750	205.94
Sullivan	3,063,829	23,777	128.86
Sumner	1,020,576	7,029	145.20
Tipton	936,043	6,743	138.82
Trousdale	192,604	1,032	186.63
Unicoi	488,150	3,568	136.81
Union	266,346	1,779	149.72
Van Buren	215,442	961	224.19
Warren	746,431	4,961	186.63
Washington	1,805,388	12,964	150.46
Wayne	529,202	2,973	178.00
Weakley	659,404	4,465	147.68
White	516,834	3,485	148.30
Williamson	782,567	5,254	148.95
Wilson	799,654	5,407	147.89
	$ 90,229,362	694,627	$ 129.90

[fol. 313]

1957-1958 STATE AID FOR EDUCATION PER PUPIL (BASED ON 1957-1958 AVERAGE DAILY ATTENDANCE) BY COUNTY COMPARED TO COUNTY'S ACTUAL AND "BY FORMULA" DIRECT REPRESENTATION IN THE HOUSE - 1951 * TENNESSEE GENERAL ASSEMBLY

COUNTY	STATE AID PER A.D.A. PUPIL 1957-1958	DIRECT REPRESENTATIVES BY FORMULA	ACTUAL DIRECT REPRESENTATIVES	OVER (+) OR UNDER (-) DIRECT REPRESENTATIVES BY FORMULA
Pickett	$ 226.74	0	0	
Van Buren	224.19	0	1	+
Moore	220.46	0	0	
Houston	208.24	0	1	+
Stewart	205.94	0	0	
Perry	205.52	0	0	
Lewis	197.95	0	0	
Decatur	193.31	0	0	
Bledsoe	189.91	0	0	
Fentress	186.72	0	0	
Trousdale	186.63	1	1	
Warren	186.63	0	0	
Clay	183.87	0	1	+
Meigs	183.18	0	0	
Overton	180.41	0	1	+
Humphreys	179.31	0	0	
Jackson	179.23	0	0	
Wayne	178.00	0	1	+
Benton	177.46	0	0	
Chester	177.06	0	1	+
Johnson	175.94	0	1	+
Hardin	172.68	0	0	
DeKalb	172.63	0	0	
Henderson	169.97	0	1	+
Sequatchie	169.52	0	0	
Cannon	169.09	0	1	+
Cheatham	166.09	0	0	
McNairy	165.75	0	1	+
Macon	163.92	0	0	
Hickman	163.48	0	0	
Grundy	163.38	1	1	
Carroll	161.35	0	0	
Scott	161.29	0	0	
Hancock	161.08	0	0	
Morgan	160.77	0	0	
Cumberland	160.67	0	1	+
Claiborne	159.03	1	1	
Henry	158.31	0	1	+
Crockett	157.45	0	1	+
Sevier	156.99	1	1	
Giles	153.13	0	1	+
Smith	151.75	1	1	
Washington	150.46	1	1	
Hardeman	150.43	1	0	
Union	149.72	0	1	+
Dickson	149.09			

* 1951-59 Tennessee General Assemblies have had same Direct Representation Composition.

1957-1958 STATE AID FOR EDUCATION PER PUPIL (BASED ON 1957-1958 AVERAGE DAILY ATTENDANCE) BY COUNTY COMPARED TO COUNTY'S ACTUAL AND "BY FORMULA" DIRECT REPRESENTATION IN THE HOUSE - 1951 * TENNESSEE GENERAL ASSEMBLY (CONT.)

COUNTY	STATE AID PER A.D.A. PUPIL 1957-1958	DIRECT REPRESENTATIVES BY FORMULA	ACTUAL DIRECT REPRESENTATIVES	OVER (+) OR UNDER (-) DIRECT REPRESENTATIVE BY FORMULA
Williamson	$ 148.93	1	1	
Coffee	148.71	1	1	
White	148.20	0	1	+
Lincoln	148.04	1	1	
Wilson	147.89	1	1	
Weakley	147.68	1	1	
Lauderdale	146.63	1	1	
Monroe	146.41	0	1	+
Sumner	145.30	1	1	
Montgomery	144.97	1	1	
Lawrence	144.55	1	1	
Gibson	144.31	1	2	+
Obion	144.26	1	1	
Marshall	144.24	0	1	+
Putnam	143.66	1	1	
Rutherford	143.46	1	1	
Bedford	143.45	1	1	
Greene	142.93	1	1	
Franklin	142.59	1	1	
Jefferson	142.49	0	0	
Robertson	142.04	1	1	
Grainger	140.79	0	0	
Haywood	140.50	1	1	
Anderson	140.47	1	0	-
Polk	139.79	0	0	
Carter	139.08	1	0	-
Tipton	138.82	1	1	
Knox	137.45	0	0	
Campbell	137.27	1	0	-
Lake	136.81	0	1	+
Unicoi	136.81	0	0	
Cocke	136.08	0	1	+
Maury	135.91	1	1	
Hamblen	134.01	1	0	-
Fayette	133.80	1	1	
Hawkins	133.76	1	1	
Blount	132.18	1	1	
Marion	129.95	0	1	+
Average	129.70			
Madison	129.34	1	2	+
Sullivan	128.86	2	1	-
McMinn	127.89	1	1	
Roane	126.70	1	1	
Dyer	126.69	1	1	
Loudon	126.49	0	0	
Bradley	122.62	1	0	-

* 1951-59 Tennessee General Assemblies have had same Direct Representation Composition.

1957-1958 STATE AID FOR EDUCATION PER PUPIL (BASED ON 1957-1958 AVERAGE DAILY ATTENDANCE) BY COUNTY COMPARED TO COUNTY'S ACTUAL AND "BY FORMULA" DIRECT REPRESENTATION IN THE HOUSE - 1951 * TENNESSEE GENERAL ASSEMBLY (CONT.)

COUNTY	STATE AID PER A.D.A. PUPIL 1957-1958	DIRECT REPRESENTATIVES BY FORMULA	ACTUAL DIRECT REPRESENTATIVES	OVER (+) OR UNDER (-) DIRECT REPRESENTATIVES BY FORMULA
Knox	$ 109.71	7	3	-
Hamilton	106.45	6	3	-
Davidson	101.03	10	6	-
Shelby	95.85	15	7	-
	TOTAL	78	76	

* 1951-59 Tennessee General Assemblies have had same Direct Representation Composition.

COMPARISON OF THE DISTRIBUTION OF STATE AID FOR EDUCATION PER AVERAGE DAILY ATTENDANCE PUPIL FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND ARTICLE II, SECTION 5, OF THE TENNESSEE STATE CONSTITUTION, IN 1951 TENNESSEE GENERAL ASSEMBLY

COUNTIES	VOTING POPULATION 1950*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL DIRECT REPRESENTATIVES 1951	STATE AID PER A.D.A. PUPIL 1951-52
Cannon	5,341	.2572	0	1	$ 149.89
Chester	6,391	.3198	0	1	176.86
Claiborne	12,799	.6404	0	1	159.03
Cocke	12,872	.6891	0	1	136.08
Coffee	9,676	.4842	0	1	157.40
DeKalb	6,984	.3495	0	1	172.45
Dickson	11,294	.5651	0	1	149.89
Gibson	48,132	1.4977	1	2	144.31
Hardin	16,908	.4792	0	1	172.48
Hickman	7,598	.3802	0	1	163.48
Jackson	6,719	.3362	0	1	179.25
Lake	6,252	.3128	0	1	136.81
McMinn	11,601	.5805	0	1	165.75
Madison	37,245	1.8636	1	2	129.34
Marion	10,998	.5503	0	1	129.95
Marshall	11,288	.5648	0	1	144.34
Monroe	12,884	.6447	0	1	146.41
Moore	2,340	.1171	0	1	220.46
Overton	9,474	.4740	0	1	180.41
Sevier	12,793	.6401	0	1	156.99
Smith	8,731	.4369	0	1	151.75
Stewart	5,238	.2621	0	1	205.94
White	9,244	.4625	0	1	148.30
		TOTAL	2	25	

Those 23 counties have 23 more direct representatives than the Constitution's formula provides.

Those 10 counties have 25 less direct representatives than the Constitution's formula provides.

Anderson	33,990	1.7007	1	0	140.47
Bradley	18,273	.9143	1	0	122.62
Campbell	17,477	.8745	1	0	137.27
Carter	23,208	1.1660	1	0	139.08
Davidson	211,980	10.6083	10	6	101.00
Hamblen	14,690	.7900	1	0	134.01
Hamilton	131,971	6.6054	6	3	106.45
Knox	140,539	7.0331	7	3	109.71
Shelby	312,345	15.6307	15	7	95.85
Sullivan	55,712	2.7976	2	1	128.86
		TOTAL	45	20	

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$ Total Tennessee Voting Population in 1950 was 1,978,543.

* U.S. Census of Population: 1950, Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 45, pp. 92-97.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

[fol. 317]

COMPARISONS OF APPORTIONMENT OF 1957-58 STATE AID FOR EDUCATION PER PUPIL IN AVERAGE DAILY ATTENDANCE FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION

COUNTIES	A.D.A. PUPILS IN COUNTY 1957-58	STATE AID FOR EDUCATION 1957-58	STATE AID PER A.D.A. PUPIL 1957-58	AMOUNT IF DISTRIBUTED EQUALLY ACCORDING TO A.D.A.*
Carroll	1,930	$ 336,345	$ 169.09	$ 250,787
Carter	2,041	359,344	176.86	265,126
Claiborne	4,374	775,184	159.03	633,133
Cocke	5,115	696,626	136.88	664,439
Crockett	3,962	623,853	157.46	514,664
DeKalb	2,163	373,391	172.63	280,974
Dickson	3,995	595,595	149.09	518,951
Gibson	9,421	1,398,383	144.31	1,249,768
Giles	3,927	678,123	172.68	510,117
Grainger	2,488	406,737	163.48	333,191
Jackson	2,687	374,059	179.23	271,101
Lake	2,094	286,475	136.81	272,011
McMinn	4,677	775,233	165.75	607,542
Madison	12,307	1,591,829	129.34	1,598,679
Marion	5,001	649,901	129.95	649,630
Marshall	3,440	496,176	144.24	446,856
Monroe	5,580	816,941	146.41	724,842
Moore	780	171,957	220.46	101,322
Overton	3,321	599,156	180.41	431,398
Sevier	5,429	852,308	156.99	705,227
Smith	2,528	383,612	151.75	328,387
Stewart	1,750	360,403	205.94	227,325
White	3,485	516,834	148.30	452,702
	92,595	$ 14,097,735		$ 12,028,092

Collectively these 23 counties receive 17.21% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

Three 10 counties collectively receive 20.81% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	7,638	1,072,910	140.47	992,176
Bradley	7,780	951,561	122.62	1,008,024
Campbell	7,846	1,079,792	137.27	1,021,793
Carter	9,733	1,353,484	139.08	1,264,317
Davidson	60,566	6,118,723	101.03	7,867,523
Hamblen	6,194	830,033	134.01	804,691
Hamilton	43,599	4,640,955	106.45	5,663,510
Knox	45,062	4,943,717	109.71	5,853,554
Shelby	106,262	10,185,532	95.85	13,803,434
Sullivan	23,777	3,063,829	128.86	3,088,622
	318,457	$ 34,240,736		$ 41,367,565

* $\frac{\text{State Aid for Education}}{\text{Pupils in Average Daily Attendance}}$ = average State per A.D.A. Pupil

for above 23 counties with excess of direct representatives: $\frac{\$14,097,735}{92,595} = \$152.25$

for above 10 counties with deficiency of direct representatives: $\frac{\$34,240,736}{318,457} = \$107.52$

for all counties in the State: $\frac{\$90,229,362}{884,827} = \$129.90$

[fol. 318]

Exhibit 9 to Amendment

1957-58 Apportionment of 2¢ of 7¢ State Gasoline and Motor Fuel Tax, by County

County	1957 Motor Vehicle Registration*	Gasoline & Motor Fuel Tax Apportionment 1957-58	Apportionment per Registered Motor Vehicle
Anderson	23,335	$ 226,482	$ 9.71
Bedford	9,622	190,320	19.78
Benton	4,230	165,600	39.15
Bledsoe	2,135	147,296	68.99
Blount	22,971	247,221	10.76
Bradley	14,766	186,659	12.64
Campbell	8,199	200,061	24.40
Cannon	3,220	144,893	45.00
Carroll	8,935	207,544	23.23
Carter	13,224	203,314	15.37
Cheatham	3,824	149,452	39.08
Chester	3,449	149,730	43.41
Claiborne	5,147	188,944	36.71
Clay	1,846	139,521	75.58
Cocke	7,237	184,050	25.43
Coffee	10,109	184,135	18.21
Crockett	4,824	155,987	31.94
Cumberland	6,650	205,314	30.87
Davidson	138,233	630,958	4.56
Decatur	3,119	154,855	49.65
Dekalb	3,413	154,141	45.16
Dickson	6,873	183,741	26.73
Dyer	11,772	211,272	17.95
Fayette	5,790	221,251	38.21
Fentress	3,224	178,884	55.49
Franklin	8,657	201,816	23.31
Gibson	16,340	240,268	14.70
Giles	7,600	210,753	27.73
Grainger	3,872	155,624	40.19
Greene	14,939	231,300	15.48
Grundy	3,100	155,154	50.05
Hamblen	12,377	155,823	12.59
Hamilton	80,391	471,544	5.87
Hancock	2,134	123,498	57.87
Hardeman	5,332	209,521	39.30
Hardin	5,555	194,385	34.99
Hawkins	8,829	198,729	22.51
Haywood	5,831	198,295	34.01
Henderson	5,255	184,656	35.14
Henry	8,510	204,024	23.97
Hickman	4,006	190,146	47.47
Houston	1,704	132,474	77.74
Humphreys	3,772	180,697	47.90
Jackson	2,442	156,252	63.99
Jefferson	7,411	166,359	22.45
Johnson	3,380	152,968	45.26
Knox	84,929	486,355	5.73
Lake	3,389	139,389	41.13

* Excluding trailers.

Note: Apportionment of 2¢ of 7¢ State Gasoline and Motor Fuel Tax shown hereon is to counties only.

[fol. 319]

1957-58 APPORTIONMENT OF 2¢ OF 7¢ STATE GASOLINE AND MOTOR FUEL TAX, BY COUNTY (CONT.)

COUNTY	1957 MOTOR VEHICLE REGISTRATION*	GASOLINE & MOTOR FUEL TAX APPORTIONMENT 1957-58	APPORTIONMENT PER REGISTERED MOTOR VEHICLE
Lauderdale	7,534	$ 195,459	$ 25.94
Lawrence	9,617	215,166	22.37
Lewis	2,290	142,334	62.15
Lincoln	8,595	204,370	23.78
Loudon	9,220	163,189	17.70
McMinn	11,721	197,225	16.83
McNairy	5,910	191,254	32.36
Macon	4,102	155,463	37.90
Madison	20,832	252,537	12.12
Marion	6,559	189,283	28.86
Marshall	7,052	169,840	24.08
Maury	16,126	229,739	14.25
Meigs	1,816	134,376	74.00
Monroe	7,938	212,279	27.08
Montgomery	15,732	227,239	14.44
Moore	1,775	120,929	68.13
Morgan	4,704	185,275	39.39
Obion	10,244	207,217	20.23
Overton	4,196	172,007	40.99
Perry	1,[illegible]	158,578	94.84
Pickett	1,201	128,014	106.59
Polk	3,695	166,882	45.16
Putnam	10,082	167,502	16.61
Rhea	6,652	154,227	23.19
Roane	12,948	191,360	14.78
Robertson	9,133	194,592	21.31
Rutherford	17,308	239,960	13.86
Scott	4,099	188,796	46.06
Sequatchie	2,731	140,396	51.41
Sevier	8,362	203,931	24.39
Shelby	196,267	892,076	4.55
Smith	4,622	158,577	34.31
Stewart	2,436	170,377	69.94
Sullivan	42,013	288,376	6.86
Sumner	12,843	212,383	16.54
Tipton	9,408	198,388	21.09
Trousdale	2,142	122,312	57.10
Unicoi	5,137	144,245	28.08
Union	3,443	141,113	40.99
Van Buren	1,046	135,871	129.90
Warren	8,852	183,909	20.78
Washington	23,483	225,713	9.61
Wayne	3,436	204,722	59.58
Weakley	8,648	207,326	23.97
White	5,532	168,468	30.45
Williamson	9,347	203,927	21.82
Wilson	10,220	205,383	20.10
	1,208,683	$ 19,142,240	$ 15.84 Average

* Excluding trailers

Note: Apportionment of 2¢ of 7¢ State Gasoline and Motor Fuel Tax shown hereon is to counties only.

[fol. 320]

1957-1958 APPORTIONMENT OF 2¢ OF 7¢ STATE GASOLINE AND MOTOR FUEL TAX PER REGISTERED VEHICLE, BY COUNTY, COMPARED TO COUNTY'S ACTUAL AND "BY FORMULA" DIRECT REPRESENTATION IN THE HOUSE - 1951 TENNESSEE GENERAL ASSEMBLY*

COUNTY	APPORTIONMENT PER REGISTERED MOTOR VEHICLE**	DIRECT REPRESENTATIVES BY FORMULA	ACTUAL DIRECT REPRESENTATIVES	OVER (+) OR UNDER (-) DIRECT REPRESENTATIVES BY FORMULA
Van Buren	$ 129.90	0	0	
Pickett	106.59	0	0	
Perry	94.84	0	0	
Houston	77.74	0	0	
Clay	75.58	0	0	
Meigs	74.00	0	0	
Stewart	69.94	0	1	+
Bledsoe	68.99	0	0	
Moore	68.13	0	1	+
Jackson	63.99	0	1	+
Lewis	62.15	0	0	
Wayne	59.58	0	0	
Hancock	57.87	0	0	
Trousdale	57.10	0	0	
Fentress	55.49	0	0	
Sequatchie	51.41	0	0	
Grundy	50.05	0	0	
Decatur	49.65	0	0	
Humphreys	47.90	0	0	
Hickman	47.47	0	1	+
Scott	46.06	0	0	
Johnson	45.26	0	0	
DeKalb	45.16	0	1	+
Polk	45.16	0	0	
Cannon	45.00	0	1	+
Chester	43.41	0	1	+
Lake	41.13	0	1	+
Union	40.99	0	0	
Overton	40.99	0	1	+
Grainger	40.19	0	0	
Morgan	39.39	0	0	
Hardeman	39.30	1	1	
Benton	39.15	0	0	
Cheatham	39.08	0	0	
Fayette	38.21	1	1	
Macon	37.90	0	0	
Claiborne	36.71	0	1	+
Henderson	35.14	0	0	
Hardin	34.99	0	1	+
Smith	34.31	0	1	+
Haywood	34.01	1	1	
McNairy	32.36	0	1	+
Crockett	31.94	0	1	+
Cumberland	30.87	0	0	
White	30.45	0	1	+
Marion	28.86	0	1	+
Unicoi	28.08	0	0	

* 1951-1959 Tennessee General Assemblies have had same Direct Representation Composition.

** Excludes trailers.

[fol. 321]

1957-1958 APPORTIONMENT OF 2¢ OF 7¢ STATE GASOLINE AND MOTOR FUEL TAX PER REGISTERED VEHICLE, BY COUNTY, COMPARED TO COUNTY'S ACTUAL AND "BY FORMULA" DIRECT REPRESENTATION IN THE HOUSE - 1951 TENNESSEE GENERAL ASSEMBLY* (CONT.)

COUNTY	APPORTIONMENT PER REGISTERED MOTOR VEHICLE**	DIRECT REPRESENTATIVES BY FORMULA	ACTUAL DIRECT REPRESENTATIVES	OVER (+) OR UNDER (-) DIRECT REPRESENTATIVES BY FORMULA
Giles	$ 27.73	1	1	
Monroe	27.08	0	1	+
Dickson	26.73	0	1	+
Lauderdale	25.94	1	1	
Cocke	25.43	0	1	+
Campbell	24.40	1	0	-
Sevier	24.39	0	1	+
Marshall	24.08	0	1	+
Weakley	23.97	1	1	
Henry	23.97	1	1	
Lincoln	23.78	1	1	
Franklin	23.31	1	1	
Carroll	23.23	1	1	
Rhea	23.19	0	0	
Hawkins	22.51	1	1	
Jefferson	22.45	0	0	
Lawrence	22.37	1	1	
Williamson	21.82	1	1	
Robertson	21.31	1	1	
Tipton	21.09	1	1	
Warren	20.78	1	1	
Obion	20.23	1	1	
Wilson	20.10	1	1	
Bedford	19.78	1	1	
Coffee	18.21	1	1	
Dyer	17.95	1	1	
Loudon	17.70	0	0	
McMinn	16.83	1	1	
Putnam	16.61	1	1	
Sumner	16.54	1	1	
Average	15.84			
Greene	15.48	1	1	
Carter	15.37	1	0	-
Roane	14.78	1	1	
Gibson	14.70	1	2	+
Montgomery	14.44	1	1	
Maury	14.25	1	1	
Rutherford	13.86	1	1	
Bradley	12.64	1	0	-
Hamblen	12.59	1	0	-
Madison	12.12	1	2	+
Blount	10.76	1	1	
Anderson	9.71	1	0	-
Washington	9.61	1	1	
Sullivan	6.86	2	1	-
Hamilton	5.87	6	3	-
Knox	5.73	7	3	-
Davidson	4.56	10	6	-
Shelby	4.55	15	7	-

* 1951-1959 Tennessee General Assemblies have had same Direct Representation Compositon.

** Excludes trailers.

[fol. 322]

COMPARISON OF THE DISTRIBUTION OF 2¢ OF THE STATE GASOLINE AND MOTOR FUEL TAX PER MOTOR VEHICLE FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5, IN 1951 TENNESSEE GENERAL ASSEMBLY

COUNTIES	VOTING POPULATION 1950*	RATIO	NUMBER OF DIRECT REPRESENTATIVES BY FORMULA**	ACTUAL DIRECT REPRESENTATIVES 1951	APPORTIONMENT PER MOTOR VEHICLE***
Cannon	5,341	.2672	0	1	$ 45.00
Chester	6,391	.3198	0	1	43.41
Claiborne	12,799	.6404	0	1	36.71
Cocke	12,572	.6291	0	1	25.43
Crockett	9,676	.4842	0	1	31.94
DeKalb	6,984	.3495	0	1	45.16
Dickson	11,294	.5651	0	1	26.73
Gibson	48,132	1.4927	1	2	14.70
Hardin	16,908	.4792	0	1	34.99
Hickman	7,598	.3002	0	1	47.47
Jackson	6,719	.3362	0	1	36.99
Lake	6,252	.3128	0	1	41.13
McNairy	11,601	.5805	0	1	32.36
Madison	37,245	1.8636	1	2	12.12
Marion	10,998	.5503	0	1	28.86
Marshall	11,288	.5648	0	1	24.08
Monroe	12,884	.6447	0	1	27.08
Moore	2,340	.1171	0	1	68.13
Overton	9,474	.4740	0	1	40.99
Sevier	12,793	.6401	0	1	24.39
Smith	8,731	.4369	0	1	34.31
Stewart	5,238	.2621	0	1	69.94
White	9,244	.4625	0	1	30.45
		TOTAL	2	25	

These 23 counties have 23 more direct representatives than the Constitution's formula provides.

These 10 counties have 25 less direct representatives than the Constitution's formula provides.

Anderson	33,990	1.7007	1	0	9.71
Bradley	18,273	.9143	1	0	12.64
Campbell	17,477	.8745	1	0	24.40
Carter	23,303	1.1660	1	0	15.37
Davidson	211,930	10.6043	10	6	4.56
Hamblen	14,090	.7050	1	0	12.59
Hamilton	131,971	6.6034	6	3	5.87
Knox	140,559	7.0331	7	3	5.73
Shelby	312,345	15.6287	15	7	4.55
Sullivan	55,712	2.7876	2	1	6.86
			45	20	

Ratio = $\frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$ Total Tennessee Voting Population in 1950 was 1,978,548.

* U.S. Census of Population: 1950, Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 42, pp. 92-97.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

*** 1957-58 Apportionment of 2¢ of the 7¢ per gallon State gasoline and motor fuel tax divided by total 1957 motor vehicle registration exclusive of trailers.

[fol. 323]

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-58 STATE GASOLINE AND MOTOR FUEL TAX PER REGISTERED VEHICLE, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE CONSTITUTION

COUNTIES	MOTOR VEHICLE REGISTRATION 1957	GASOLINE & MOTOR FUEL TAX APPORTIONMENT 1957-58	APPORTIONMENT PER VEHICLE	AMOUNT IF APPORTIONED EQUALLY PER VEHICLE*
Carroll	3,220	$ 144,893	$ 45.00	$ 51,005
Chester	3,449	149,730	43.41	54,632
Claiborne	5,147	188,944	36.71	81,128
Cocke	7,237	184,050	25.43	114,634
Crockett	4,884	155,987	31.94	77,363
DeKalb	3,413	154,141	45.16	54,062
Dickson	6,873	183,741	26.73	108,868
Gibson	16,340	240,268	14.70	258,826
Hardin	5,555	194,385	34.99	87,991
Hickman	4,006	190,146	47.47	63,455
Jackson	2,442	156,252	63.99	38,681
Lake	3,389	139,389	41.13	53,682
McNairy	5,910	191,254	32.36	93,614
Madison	20,832	252,537	12.12	329,979
Marion	6,599	189,283	28.86	103,895
Marshall	7,052	169,840	24.08	111,704
Monroe	7,938	212,279	27.08	125,738
Moore	1,775	120,929	68.13	28,116
Overton	4,196	172,007	40.99	66,465
Sevier	8,362	203,931	24.39	132,454
Smith	4,622	158,577	34.31	73,212
Stewart	2,436	170,377	69.94	38,568
White	5,532	168,468	30.45	87,627
	141,169	$ 4,091,408		$ 2,236,099

Collectively these 23 counties receive 83.0% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

Collectively these 10 counties receive 159.8% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	23,335	226,482	9.71	369,626
Bradley	14,766	186,659	12.64	233,893
Campbell	8,199	200,061	24.40	129,872
Carter	13,224	203,314	15.37	209,468
Davidson	138,233	630,958	4.56	2,189,611
Hamblen	12,377	155,823	12.59	196,052
Hamilton	80,391	471,544	5.87	1,273,393
Knox	84,929	486,355	5.73	1,345,275
Shelby	196,267	892,076	4.55	3,108,869
Sullivan	42,013	288,376	6.86	665,486
	613,734	$ 3,741,648		$ 9,721,545

* $\frac{\text{Total Gasoline and Motor Fuel Tax}}{\text{Total Motor Vehicle Registration exclusive of trailers}}$ = average state aid per vehicle

for above 23 counties with excess of direct representatives: $\frac{\$4,091,408}{141,169} = \$28.98$

for above 10 counties with deficiency of direct representatives: $\frac{\$3,741,648}{613,734} = \$6.10$

for all counties in the State: $\frac{\$19,142,240}{1,208,683} = \$15.84$

[fol. 324]

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-58 STATE GASOLINE AND MOTOR FUEL TAX PER CAPITA, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION

COUNTIES	COUNTY POPULATION 1950	GASOLINE AND MOTOR FUEL TAX APPORTIONMENT 1957-1958	APPORTIONMENT PER CAPITA	AMOUNT IF APPORTIONED EQUALLY PER CAPITA*
Carroll	9,174	$ 144,893	$ 15.79	$ 53,393
Chester	11,149	149,730	13.43	64,887
Claiborne	24,788	188,944	6.80	144,266
Cocke	22,991	164,050	8.01	133,808
Crockett	16,624	155,987	9.38	96,752
DeKalb	11,680	154,141	13.20	67,978
Dickson	18,805	183,741	9.77	109,445
Gibson	48,132	240,268	4.99	280,128
Hardin	16,908	194,385	11.50	98,405
Hickman	13,353	190,146	14.24	77,714
Jackson	12,348	156,252	12.65	71,865
Lake	11,655	139,389	11.96	67,832
McNairy	20,390	191,254	9.38	118,670
Madison	60,128	252,537	4.20	349,951
Marion	20,520	189,283	9.22	119,426
Marshall	17,768	169,840	9.56	103,410
Monroe	24,513	212,279	8.66	142,666
Moore	3,948	120,929	30.63	22,977
Overton	17,566	172,007	9.79	102,234
Sevier	23,375	203,931	8.72	136,043
Smith	14,098	158,577	11.25	82,050
Stewart	9,175	170,377	18.57	53,399
White	16,204	168,468	10.40	94,307
	445,292	$ 4,091,408		$ 2,591,656

Collectively these 23 counties receive 57.9% more state aid than formula* would allow and have 23 more direct representatives that Constitution's formula provides.

Collectively these 10 counties receive 136.9% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	59,407	226,482	3.81	345,749
Bradley	32,338	186,659	5.77	188,207
Campbell	34,369	200,061	5.82	200,028
Carter	42,432	203,314	4.79	246,954
Davidson	321,758	630,958	1.96	1,872,632
Hamblen	23,976	155,823	6.50	139,540
Hamilton	208,255	471,544	2.26	1,212,044
Knox	223,007	486,355	2.18	1,297,901
Shelby	482,393	892,076	1.85	2,807,527
Sullivan	95,063	288,376	3.03	553,267
	1,522,998	$ 3,741,648		$ 8,863,849

* $\frac{\text{Total Gasoline \& Motor Fuel Tax}}{\text{Total State Population 1950}}$ = average state aid per capita

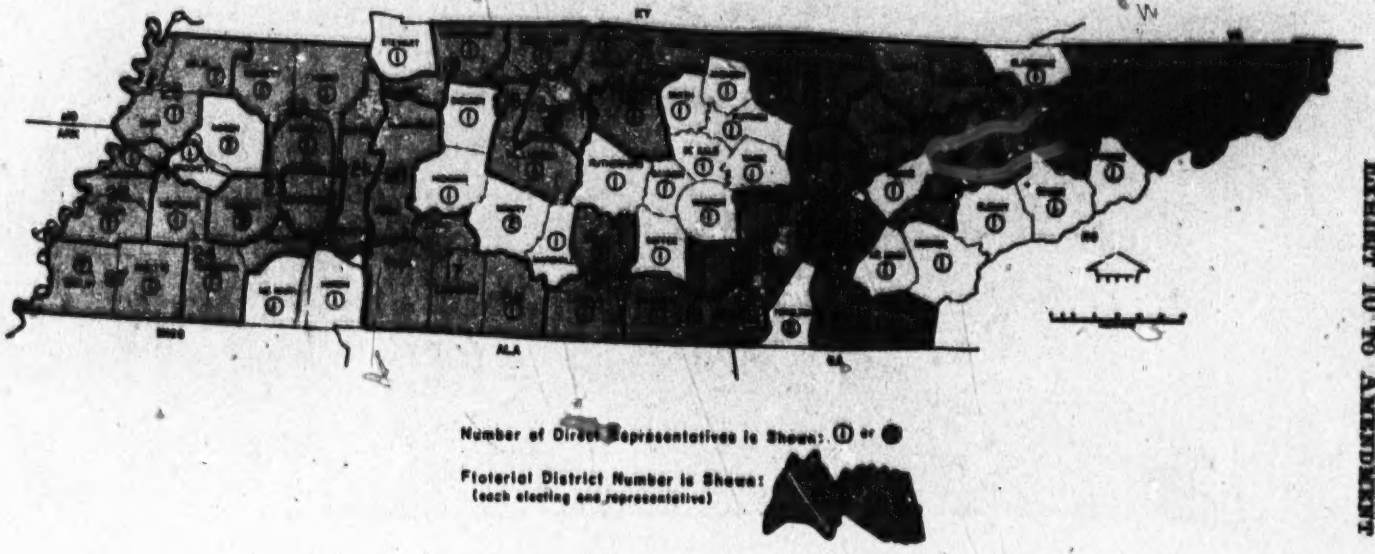
for above 23 counties with excess of direct representatives: $\frac{\$4,091,408}{445,292} = \$9.19$

for above 10 counties with deficiency of direct representatives: $\frac{\$3,741,648}{1,522,998} = \$2.46$

for all counties in the State: $\frac{\$19,142,240}{3,291,718} = \$5.82$

APPORTIONMENT OF SEATS IN THE HOUSE OF REPRESENTATIVES - 1901

(96 TENNESSEE COUNTIES)

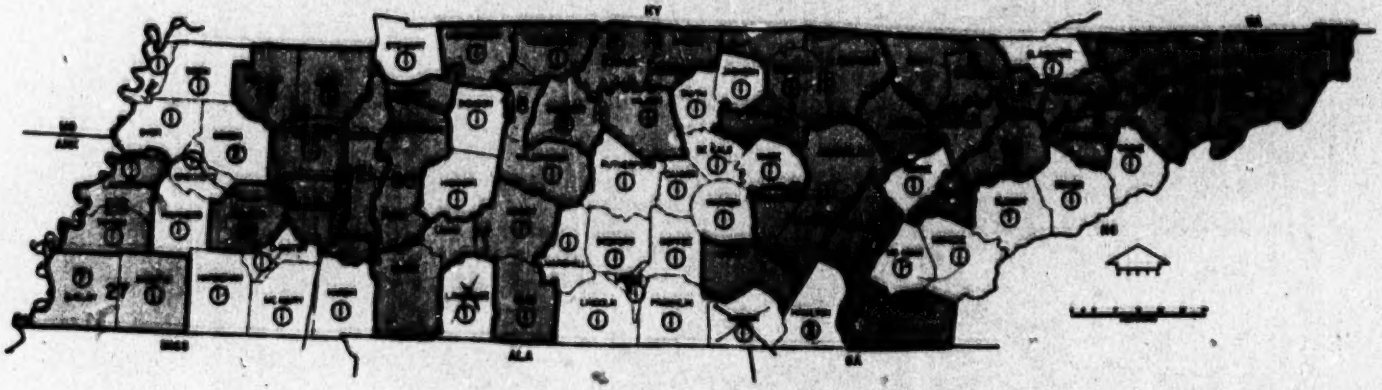


Number of Direct Representatives is Shown: ① or ●

Pictorial District Number is Shown:
(each electing one representative)

APPORTIONMENT OF SEATS IN THE HOUSE OF REPRESENTATIVES - 1951*

(95 TENNESSEE COUNTIES)



Number of Direct Representatives is Shown: ① or ●

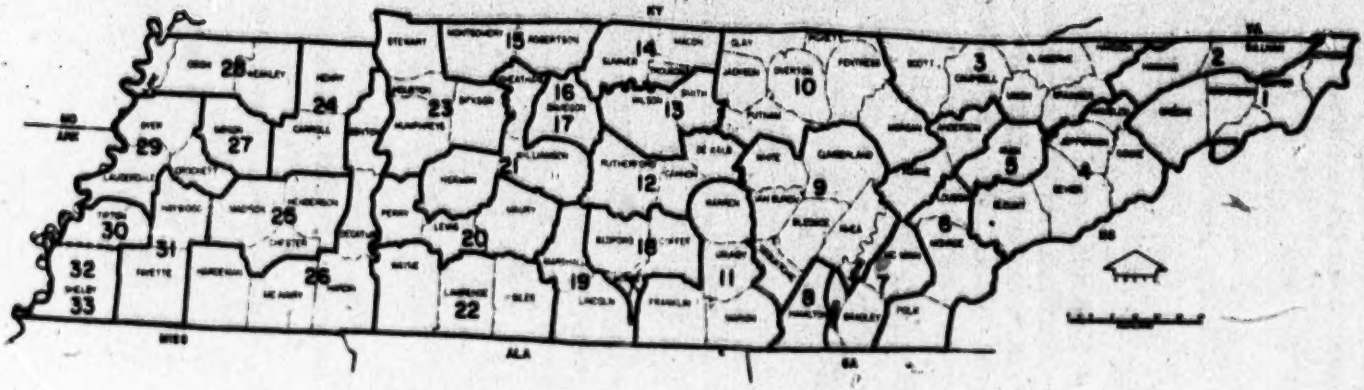
Pictorial District Number is Shown:
(each electing one representative)



* Same apportionment exists for the 1950 legislature

APPORTIONMENT OF SEATS IN THE SENATE - 1901

(96 TENNESSEE COUNTIES)



Senatorial District Boundary

Single County District Boundary where County Shares Another District with Other County or Counties

[fol. 327]

EXHIBIT 12 TO AMENDMENT

[fol. 328] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

PETITION OF CITY OF KNOXVILLE TO INTERVENE—
Filed March 22, 1960

The petition of the City of Knoxville, a municipal corporation of approximately one hundred and thirty thousand citizens, incorporated under the laws of the State of Tennessee respectfully represents to this Honorable Court as follows:

That the City Council representing the citizens of Knoxville, who are citizens of the State of Tennessee and of the United States and in Knox County, and who are entitled to vote for members of the Legislature for the State of Tennessee have by petition duly passed, authorized and directed the Mayor and the City Attorney to file this intervening petition on behalf of the Council and of all the qualified voters in said City, County and State, residing in the City of Knoxville.

[fol. 329] The intervening petitioner respectfully petitions that the three election commissioners who hold elections in the City of Knoxville and Knox County, be included and made parties-defendant in this cause, their names being Robert Lavin, Chairman, 705 Market Street, Knoxville, Tennessee; T. Edward Cole, 503 Empire Building, Knoxville, Tennessee; and Frank L. Henderlight, 3900 McCalla Avenue, Knoxville, Tennessee.

A copy of the instructions to election officials and watchers is appended hereto as Exhibit I to this petition but will not be copied herein.

Petitioner and the citizens of Knoxville, Knox County, State of Tennessee, are now denied the right to equal suffrage in free and equal elections which right is granted to them by the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the

United States; that there is no equality in the benefits and protections of the general laws and special acts passed by the Legislature with reference to the petitioner and all other citizens of Knoxville and Knox County, and that citizens of Knoxville and Knox County have been and are being unlawfully and illegally discriminated against by reason of and because of the inequality of suffrage in the matter of general elections, particularly election of members of the State Legislature and the laws passed by said illegal and unconstitutional Assembly.

Petitioner desires to intervene in this cause for the reasons aforesaid and for the further reason that citizens of the City of Knoxville, Knox County, Tennessee, and the Election Commissioners in and for said Knox County, Tennessee are not specifically named as plaintiffs in said cause nor as defendants to said cause, although they are entitled to present to this Court the interest of said citizens for the purposes of the complaint filed herein.

[fol. 330] Petitioner and those citizens similarly situated adopt the allegations of the original complaint and desire to make the Knox County Election Commissioners parties-defendant. They further desire to present for the consideration of the Court the gross inequalities being practiced on all the citizens and qualified voters of the City of Knoxville, Knox County, Tennessee, by the present unconstitutional apportionment of the Tennessee Legislature.

Wherefore, Premises Considered, Petitioner Prays:

1. That it be given leave of Court to intervene in this cause as a party-plaintiff and as a representative of all the citizens and voters of Knoxville, Knox County, Tennessee, and be granted such rights as it may be entitled to have as plaintiff.

2. That the election officials, that is, the Commissioners of Elections of Knox County, Tennessee, be made parties-defendant in said cause so that adequate, whole, and exact justice may be done herein.

3. That process issue to the defendants, Knox County Election Commissioners, by this court directing under the rules of the Court that they be made parties-defendant herein, and that copies of this petition be served on each

member at the office of the Knox County Election Commission in the County Court House Building at Knoxville, Knox County, Tennessee, requiring them to answer and plead said cause or to show cause why they should not be named among the parties-defendant.

4. Petitioner prays for general relief.

C. R. McClain, City Attorney, City of Knoxville, Tenn.

[fol. 331] *Duly sworn to by John J. Duncan, jurat omitted in printing.*

[fol. 332]

ATTACHMENT TO PETITION

Knoxville, Tennessee, Tuesday, November 24, 1959.

The Council of the City of Knoxville met in regular session Tuesday, November 24, 1959, at 7:30 o'clock P. M. Present and presiding was His Honor, Mayor Duncan. Also present were Councilmen Bass, Carey, Christenberry, Friedman, O'Connor, Turner and Walker.

Councilman O'Connor moved that the minutes as mailed to each member of Council be approved without additions or corrections. The motion was duly seconded by Councilman Christenberry and carried.

Among other proceedings had was the following:

Resolution No. 2690, entitled, "A Resolution Authorizing the Mayor of the City of Knoxville to Intervene and Participate in the Case of Baker, et al. vs. Carr, et al., Pending in the United States District Court for the Middle District of Tennessee, and Having as its Object the Reapportionment of the General Assembly of Tennessee", was presented and read and Councilman Carey moved that same be adopted on first and final reading. The motion was duly seconded by Councilman Friedman and on roll call Councilmen Bass, Carey, Christenberry, Friedman, O'Connor, Turner and Walker voted "Yea". The resolution was declared adopted on first and final reading and is as follows:

(See page 3* for copy of Resolution No. 2690)

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* Side folio 334.

Councilman Carey moved to adjourn. The motion was duly seconded and carried.

John J. Duncan
Presiding Officer of the Council

Nessie M. Beeler
Recorder

[fol. 333] I, Nessie M. Beeler, Recorder of the City of Knoxville, Tennessee, do hereby certify that the foregoing is a true and correct copy of all that part of the minutes of the meeting of the Council of the City of Knoxville, Tennessee, held November 24, 1959, which relates to the adoption of Resolution No. 2690, "A Resolution Authorizing the Mayor of the City of Knoxville to Intervene and Participate in the Case of Baker, et al. vs. Carr, et al., Pending in the United States District Court for the Middle District of Tennessee, and Having as its Object the Reapportionment of the General Assembly of Tennessee", on first and final reading, as the same appears of record in Minute Book No. 27, under date of November 24, 1959, in my office.

Witness my hand and the official seal of said City this 27th day of November, 1959.

Nessie M. Beeler, Recorder, City of Knoxville, Tennessee.

[fol. 334]

ATTACHMENT TO PETITION

RESOLUTION No. 2690

A RESOLUTION AUTHORIZING THE MAYOR OF THE CITY OF KNOXVILLE TO INTERVENE AND PARTICIPATE IN THE CASE OF BAKER, ET AL. VS. CARR, ET AL., PENDING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, AND HAVING AS ITS OBJECT THE REAPPORTIONMENT OF THE GENERAL ASSEMBLY OF TENNESSEE.

WHEREAS, no Act of Apportionment of the General Assembly of Tennessee has been enacted since 1901 A.D., despite the requirements of the Constitution of Tennessee

that the General Assembly be apportioned among the qualified voters of the State equally at ten-year intervals, and

WHEREAS, the Apportionment Act of 1901 worked to deprive Knox County and the citizens of Knoxville, Tennessee, of a portion of the representation previously had by it, although the qualified voters of this community were then entitled to increased representation in the General Assembly and the almost sixty years which have passed have worked to further debase the electoral franchise had by the citizens of Knoxville and Knox County, Tennessee, in that the population of this community has steadily increased, and

WHEREAS, representation in the General Assembly is now so grossly unequal that in some instances voters of one County have many times the representation as is had by the voters and citizens of Knoxville, Knox County, Tennessee, whereby the citizens and voters of this County and others similarly situated are deprived of the equal protection of the laws, and

WHEREAS, the debasement of the right to vote had by the people of Knoxville, Tennessee, and other areas in Tennessee similarly situated, is such that said Apportionment Act of 1901 now requires that less than 40% of the people of Tennessee elect 66⅔% of the House of Representatives, while one-third of the people of Tennessee elect two-thirds of the State Senate, and said Act prohibits the election of a General Assembly representative of a majority of the people of Tennessee, and, is, therefore, wholly unfair, [fol. 335] undemocratic and absolutely unconstitutional, and

WHEREAS, that unlawfully constituted majority of the General Assembly has exercised its unconstitutional authority over the citizens of Knoxville and other areas similarly situated, by requiring an unequal sharing in the cost of government of Tennessee, and

WHEREAS, there is no apparent relief in sight from the taxation without representation presently existing in Tennessee, and the disproportionate expense of government now borne by the citizens of Knoxville will in all probability be increased unless some relief is found, and

WHEREAS, the people of the City of Knoxville are deprived of any political remedy, in that they are not permitted vote for or against the absolute majority of the General Assembly apportioned to the over-represented areas of the State of Tennessee, and

WHEREAS, a group of City and County officials and individual citizens of Tennessee have sought relief in the United States District Court at Nashville, in the case of Baker, et al., vs. Carr, et al., and in their case seek a declaration of the invalidity of the Apportionment Act of 1901 and a reapportionment of the General Assembly of the State of Tennessee, and

WHEREAS, the people of Knoxville and Knox County, Tennessee, would benefit financially and would with all others in Tennessee benefit by an enforced respect for an observance of the Supreme organic law of Tennessee, and it is in the best interest of the City of Knoxville that the cause of the people of the City of Knoxville be presented to that three Judge District Court assigned and established for the trial of said case.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE [fol. 336] CITY OF KNOXVILLE:

SECTION 1: That the Mayor of the City of Knoxville be and he is hereby authorized to intervene and participate in said case in the United States District Court, Baker et al., v. Carr, et al., and to take any and all necessary steps in proving the long continued mistreatment of the people of the City of Knoxville at the hands of the unlawfully apportioned General Assemblies of Tennessee convened pursuant to the Apportionment Act of 1901.

SECTION 2: BE IT FURTHER RESOLVED, That this resolution shall take effect from and after its adoption, the welfare of the City requiring it.

/s/ JOHN J. DUNCAN
Presiding Officer of the Council

/s/ NESSIE M. BEELER
Recorder

[fol. 336a]

EXHIBIT I TO PETITION

INSTRUCTIONS

To

ELECTION OFFICIALS

AND

WATCHERS

General Provisions of the Law

Title 2

[fol. 337]

ELECTION LAWS

The following laws relating to elections are taken verbatim from the TENNESSEE CODE ANNOTATED, enacted as Chapter 6 of the Public Acts of Tennessee for 1955:

CHAPTER 2

QUALIFICATION OF ELECTORS

TCA 2-202 RESIDENCE REQUIREMENTS—PENALTY FOR IMPROPER VOTING.—All voters shall be required to vote in the civil district, ward or precinct where they may reside, except as otherwise provided in this Code. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty dollars ($20.00) nor more than fifty dollars ($50.00). (Acts 1869-1870, Ch. 22, Sec. 1; 1870, Ch. 10, Sec. 4; Shan., Secs. 1168, 6860; mod. Code 1932, Secs. 1938, 11329.)

CHAPTER 11

OFFICERS OF ELECTIONS

TCA 2-1101 OFFICIALS CONDUCTING ELECTIONS —VACANCIES ON BOARD-FILLING.—All elections shall be opened and held by the officers, judges, and clerks of elections, appointed by the commissioners of elections, according to law, and if any of said officers, judges, or clerks

shall fail to attend, other persons shall be selected to fill such vacancy by a majority of the election officers in attendance. (Code 1858, Sec. 839 (deriv. Acts 1835-1836, Ch. 2, Sec. 1); Acts 1870, Ch. 23, Sec. 9; impl. am. Acts 1907, Ch. 436, Secs. 9-11, 14; Shan., Secs. 1157, 1178; Code 1932, Secs. 1918, 1947.)

TCA 2-1102 ELECTION OFFICIALS ABSENTING SELVES—FILLING VACANCIES—QUALIFICATIONS OF PERSONS SELECTED.—When, for any reason, any judge, clerk or officer of election, so appointed, fails to attend promptly, and by reason of his absence at the hour, opening of the polls is delayed or about to be, other persons shall be selected to fill such vacancies by a majority of the election officials duly appointed and attending, but the persons so selected shall be residents and citizens of the ward, district or precinct for which they are to serve and shall act only until the regularly appointed officials, in whose stead they were selected, appear and demand that they be allowed to serve. Then, the persons so selected shall cease to act. Any person selected to fill such vacancy shall, also, be of the same political party as the person in whose stead he was selected. (Acts 1907, Ch. 436, Sec. 14; Shan., [fol. 338] Sec. 1188a37; mod. Code 1932, Sec. 1949.)

TCA 2-1103 VACANCIES—FILLING WHEN NO ELECTION OFFICIALS PRESENT.—If all the election officers, whose duty it is to attend at a particular place of voting under the law, fail to attend, any justice of the peace present, or, if no justice of the peace be present, any three (3) freeholders may perform the duties of appointing the inspectors or judges, or, in case of necessity, may act as officers or inspectors. (Code 1858, Sec. 843; impl. am. Acts 1907, Ch. 436; Shan., Sec. 1184; Code 1932, Sec. 1950.)

TCA 2-1104 OATH OF JUDGES.—The officer or person holding any election, or some justice of the peace, before the opening of the polls, shall administer to the judges appointed to hold the election the following oath: "You do solemnly swear that, as judge of this election, you will suffer no one to vote, whom you know, of your own knowledge, or who appears, either by his own oath or by the

testimony of others, not to be a qualified voter; that you will not suffer the ballot box to be out of the presence or sight of at least two of your number until every vote is counted out; that you will faithfully and impartially conduct yourselves as judges of this election; and that you will, in all respects, perform the duties imposed upon you by law as judges and inspectors of this election. So help you God." (Code 1858, Sec. 844 (deriv. Acts 1841-1852, Ch. 31, Sec. 5); Acts 1879, Ch. 181, Sec. 1; Shan., Sec. 1185; Code 1932, Sec. 1951.)

TCA 2-1105 OATH OF CLERK OF ELECTION.—The clerks of the different elections shall take the following oath: "You do solemnly swear that you will faithfully, truly, and impartially discharge your duty as clerks of this election. So help you God." Which oath shall be administered by the person administering the oath of office to the judges or inspectors of the election, or by one of the judges themselves. (Code 1858, Sec. 845 (deriv. Acts 1841-1842, Ch. 31, Sec. 11); Shan., Sec. 1186; Code 1932, Sec. 1952.)

TCA 2-1108 APPOINTMENT OF ELECTION OFFICIALS ANNOUNCED BY NEWSPAPER PUBLICATION.—It shall be the duty of said commissioners, within fifteen (15) days prior to any election held within the county for which they are appointed, to appoint and announce by publication in a newspaper of the county, if there shall be one, the appointment of one (1) officer, three (3) judges and two (2) clerks for each and every voting place in their county to superintend the election in the precinct or voting place for which said officers, judges and clerks [fol. 339] shall be appointed. (Acts 1907, Ch. 436, Sec. 9; 1909, Ch. 104, Sec. 1; Shan., Sec. 1188a24; impl. am. Acts 1919, Ch. 45, Sec. 1; Code 1932, Sec. 1977; Acts 1939, Ch. 53, Sec. 3; C Supp. 1950, Sec. 1977.)

TCA 2-1110 WATCHERS FOR EACH VOTING PLACE — APPOINTMENT — RIGHTS AND PRIVILEGES.—Two (2) watchers representing the majority party in the state and two (2) watchers representing the minority party in the state may be appointed at each precinct or voting place, and one of the watchers representing the majority party shall be appointed only by the chairman

of the county executive committee of the majority party in the state and the other by a majority of the candidates of the majority party running exclusively within the county in which the watchers are to be appointed, and the watchers representing the minority party shall be in like manner appointed, one by the chairman of the county executive committee of the minority party in the state and the other by a majority of the candidates of the minority party running exclusively within the county in which the watcher is to be appointed, and in case such candidates of either party fail to appoint the watchers two (2) whole days prior to the election, the chairman of the county executive committee representing the party whose candidates failed to appoint such watcher shall appoint both watchers representing his party. The appointment of said watchers shall be made in writing and signed by the parties authorized to make the appointment and presented to the judges holding the election, and said watchers shall have full access to the polling places during the time the votes are being polled and counted, and the right to inspect all ballots while being called and counted and all tally sheets and poll lists during preparation and certification thereof, but they shall not in any way interfere with any voter in the preparation or casting of his ballot, or the judges, officers, or clerks in the performance of their respective duties in the holding of the elections. (Acts 1907, Ch. 436, Sec. 9; 1909, Ch. 104, Sec. 1; Shan., Sec. 1188a27; Code 1932, Sec. 1979.)

TCA 2-1111 CLERKS OF ELECTION—APPOINTMENT.—If competent persons of different political parties are willing to serve, they shall be appointed from the two (2) political parties most numerously represented at such precinct or voting place. (Acts 1907, Ch. 436, Sec. 10; 1909, Ch. 104, Sec. 2; Shan., Sec. 1188a29; Code 1932, Sec. 1981.)

TCA 2-1112 APPOINTMENT OF CLERKS BY COMMISSIONERS REPRESENTING DIFFERENT PAR- [fol. 340] TIES.—One of said clerks shall be appointed by the members of the commissioners of elections representing the majority party, and the other clerk shall be appointed by the member of the commissioners of elections representing the minority party in the state. (Acts 1907, Ch. 436,

Sec. 10; 1909, Ch. 104, Sec. 2; Shan., Sec. 1188a30; Code 1932, Sec. 1982.)

TCA 2-1113 "MINORITY PARTY" DEFINED.—By minority party is meant the party polling in the state the second highest number of votes for presidential electors at the presidential election immediately preceding the appointment of officers under this chapter. (Acts 1907, Ch. 436, Sec. 10; 1909, Ch. 104, Sec. 2; Shan., Sec. 1188a31; Code 1932, Sec. 1983.)

TCA 2-1116 NONAPPEARANCE OF APPOINTEE A MISDEMEANOR—DEFENSES.—Any person so notified of his appointment who fails to appear at the time and place designated in said notice, and discharge the duties of the office to which he has been appointed, shall be guilty of a misdemeanor and be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00). But it shall be a good defense to show to the satisfaction of the court that on the date fixed for said election, the state of his own health, or that of some member of his family was such as to require his absence from said election, or that some pressing or urgent business engagement, the neglect of which would cause irreparable loss, or that the public service would have been materially injured. Any false statement under oath, knowingly made as to the existence of either of these defenses, shall constitute the offense of perjury. (Acts 1919, Ch. 45, Sec. 1; Shan. Supp., Sec. 1188a34b2; mod. Code 1932, Sec. 1987.)

TCA 2-1117 NOTICE GIVEN OF NONAPPEARANCE OF APPOINTEES—PROSECUTION.—It shall be the duty of the officers present and holding the election, to certify to the chairman of the commissioners of elections of the county, the names of those who fail to appear at the time and place named in said notices and discharge the duties of the office to which they have been appointed. And it shall be the duty of the chairman to furnish the first grand jury sitting in the county after the date of holding such election, the names of the delinquent officials, provided, however, that should such delinquent official, on or before the convening of such grand jury, file with said chairman his affidavit, as provided in Sec. 2-1116, it shall be the duty

of said chairman to file such affidavit together with his [fol. 341] recommendation in the premises, with the grand jury and upon the receipt of which it may then determine whether or not it will exercise its inquisitorial power as to such case. (Acts 1919, Ch. 45, Sec. 2; Shan. Supp., Sec. 1188a34b3; mod. Code 1932, Sec. 1988; impl. am. Acts 1953, Ch. 88, Sec. 11.)

TCA 2-1118 JUDGES AND CLERKS APPOINTED FROM TWO PARTIES MOST NUMEROUSLY REPRESENTED.—The commissioners of elections in appointing judges and clerks in all elections shall give bona fide representation to each of the two (2) parties most numerously represented in the ward, district, or precinct for which they are appointed. (Acts 1907, Ch. 436, Sec. 12; Shan., Sec. 1188a35; Code 1932, Sec. 1989.)

TCA 2-1120 GOVERNMENT OFFICERS OR EMPLOYEES PROHIBITED FROM SERVING AS PRIMARY ELECTION OFFICIALS.—No state, county, municipal, or federal government officer or employee, including the deputy or employees of such officer or employee, whether elected or appointed, shall serve as a member of any primary election board, or as an officer, judge, clerk or registrar in any primary election, nor shall any candidate to be voted on in any primary election be eligible to serve on a primary election, provided, however, that the offices of justices of the peace, notary public, and school teacher shall not be considered officers and employees within the purview of Secs. 2-1120, 2-1121. (Acts 1951, Ch. 260, Sec. 1 (Williams, Sec. 2227.32a).)

Chapter 12

DORTCH BALLOT LAW

TCA 2-1208 VOTER UNABLE TO WRITE FURNISHED PASTE-IN SLIPS.—If said voter cannot write, he may receive from the officer holding the election a slip upon which the name of the candidate to be voted for is printed, and such slip shall be pasted in the appropriate blank space by the voter. The candidate to be voted for shall furnish the officer holding the election with said slips.

(Acts 1890 (1st E.S.), Ch. 24, Sec. 3; Shan., Sec. 1236; Code 1932, Sec. 2049.)

TCA 2-1218 REGULATIONS FOR VOTING—BALLOT AND INSTRUCTION CARD FURNISHED.—The registrar having the official ballots shall stand not closer than ten (10) feet to the entrance of the room in which the ballot box is placed. A double gangway, with rail guards, may run from the point occupied by the registrar to the said entrance, and no one who has already voted, or who is not ready or qualified to vote, shall come nearer than [fol. 342] fifty (50) feet to said rail guard or entrance. As requested by each of the voters, the registrar shall hand the voter one official ballot and a card of instructions, but so that not more voters than there are voting compartments shall be admitted into the room in which are ballot boxes and the compartments, tables, or shelves. (Acts 1890 (1st E.S.), Ch. 24, Sec. 13; Shan., Sec. 1246; Code 1932, Sec. 2059.)

TCA 2-1219 BALLOT AND CERTIFICATE OF REGISTRATION TO BE NUMBERED.—Upon receipt of his ballot, the voter shall forthwith enter the room in which the voting is to take place, and present to the assistant registrar his blank ballot and certificate of registration, provided, the registrar shall, upon demand of any voter made at the time his ballot is handed to him, give to such voter a correct statement of the order in which the title of the various offices to be filled stand upon the particular ballot furnished to such voter. The assistant registrar shall then number the ballot upon the stub thereof, and also place upon the certificate of registration the same number. (Acts 1890 (1st E.S.), Ch. 24, Sec. 14; Shan., Sec. 1247; Code 1932, Sec. 2060.)

TCA 2-1220 MARKING BALLOT.—The voter shall then go to one of the voting shelves, tables, or compartments, and shall prepare his ballot by marking in the appropriate margin or place a cross (x) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor, and marking a cross (x) opposite thereto, and likewise a cross opposite the answer

he desires to give in case of a constitutional amendment or other proposition. (Acts 1890 (1st E.S.), Ch. 24, Sec. 14; Shan., Sec. 1248; Code 1932, Sec. 2061.)

TCA 2-1221 FOLDING AND PRESENTATION OF BALLOT—STUB TORN OFF AND DESTROYED.—Before leaving the voting shelf or compartment, the voter shall fold his ballot, without displaying the marks thereon, but so that the words "Official ballot for," followed by the designation of the polling place for which the ballot is prepared, the date of the election, and the facsimile of the signatures of the commissioners of election, and the numbered stub shall be plainly visible to the officers of election, and shall present to said officers his certificate of registration and marked ballot, and if the numbers on each correspond, the officer of election shall tear off and destroy said stub at once. (Acts 1890 (1st E.S.), Ch. 24, Sec. 14; impl. am. Acts 1907, Ch. 436, Sec. 19; Shan., Sec. 1249; Code 1932, Sec. 2062.)

[fol. 343] TCA 2-1222 REPEATING TO BE PREVENTED.—To prevent repeating by voters, Sec. 2-315 shall be complied with. (Acts 1890 (1st E.S.), Ch. 24, Sec. 14: Shan., Sec. 1250; mod. Code 1932, Sec. 2063.)

TCA 2-1223 MANNER OF VOTING—TIME LIMIT.—The voter shall then vote in the manner provided by law He shall mark and deposit his ballot, without undue delay and shall quit said inclosed space or room as soon as he has voted. No such voter shall be allowed to occupy a voting shelf, table, or compartment already occupied by another, nor longer than ten (10) minutes if other voters are not waiting, nor longer than five (5) minutes in case other voters are waiting. (Acts 1890 (1st E.S.), Ch. 24, Sec. 14; Shan., Sec. 1251; Code 1932, Sec. 2064.)

TCA 2-1224 PERSONS ALLOWED IN VOTING ROOM —PEACE OFFICER, DUTIES.—No person shall be allowed in the room in which said ballot box and compartments are, except the officers of election and those appointed by the officer holding the election, and none other, to secure the observance of the provisions of this chapter. In the case of cities having duly enrolled policemen or peace officers,

the city authorities may designate the officers to keep the peace at the polls on the outside of the room in which is the ballot box, and not closer than ten (10) feet to the entrance or outer rail guard, if there be such, leading to said room. But in no event shall said policemen or peace officers come nearer to said entrance than ten (10) feet, or enter the room in which is the ballot box, unless specially requested to do so by the officer holding the election, and at any time when requested to do so by said officer holding the election, the said policeman or policemen shall retire from the room in which is the ballot box, and to a point not nearer than ten (10) feet to the aforesaid entrance or rail guard. (Acts. 1890 (1st E.S.), Ch. 24, Sec. 14; Shan., Sec. 1252; Code 1932, Sec. 2065.)

TCA 2-1226 ASSISTANCE TO PHYSICALLY DISABLED VOTERS.—Any voter who declares to the officer holding the election, that, by reason of blindness or other physical disability, he is unable to mark his ballot, shall upon request, receive the assistance of the officer holding the election in the marking thereof, and such officer shall certify on the outside that it was so marked with his assistance, and shall give no information in regard to the same. Provided that any person who is unable to mark his ballot by virtue of total blindness may have any reputable person of his selection mark the same. (Acts 1890 (1st E.S.), Ch. 24: Sec. 16; Shan., Sec. 1254; Code 1932, Sec. [fol. 344] 2067; Acts 1937, Ch. 126, Sec. 1; 1949, Ch. 274, Secs. 1-3; C. Supp. 1950, Sec. 2067; Acts 1951, Ch. 232, Sec. 1.)

TCA 2-1227 IMPROPERLY MARKED BALLOTS.—If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. But this shall not vitiate the ballot so far as properly marked. No ballot without the official indorsement of the chairman of the board of commissioners shall be deposited, and none but ballots provided in accordance with the provisions of this chapter shall be counted. (Acts 1890 (1st E.S.), Ch. 24, Sec. 17; Shan., Sec. 1255; Code 1932, Sec. 2068.)

TCA 2-1228 OFFENSES COMMITTED IN VOTING PENALIZED—REJECTION OF BALLOTS.—A voter who shall, except as herein otherwise provided, allow his ballot to be seen by any person, or who shall take or remove, or attempt to take or remove, any ballot from the polling place, before the close of the polls, or who shall make a false statement as to his inability to mark his ballot, or place any mark upon his ballot by which it may be afterward identified as the one voted by him, or any person who shall interfere, or attempt to interfere, with any voter when inside said inclosed space, or when marking his ballot, or who shall remain longer than the specified time allowed by this chapter in the booth after being notified that his time has expired, or who shall endeavor to induce any voter, before voting, to show how he marks or has marked his ballot, or aid, or attempt to aid, any voter, by means of any mechanical device, or any other means whatever, in marking his ballot, shall be punished by fine not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00); and election officers shall cause any person so doing to be arrested and treated as one caught in the act of committing a misdemeanor; and any ballot marked by the voter for identification shall be rejected. (Acts 1890 (1st E.S.), Ch. 24, Sec. 18; Shan., Sec. 1256; Code 1932, Sec. 2069.)

TCA 2-1229 REFUSAL OR FAILURE BY ELECTION OFFICIALS TO PERFORM DUTIES A MISDEMEANOR—PENALTY.—Any commissioner of elections or registrar who willfully and knowingly refuses or fails to perform the duties herein prescribed shall be guilty of a misdemeanor, and subject to a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), and to imprisonment in the county jail not less than ten (10) nor more than ninety (90) days, in the discretion of the court. Any officer of election who violates, willfully and knowingly, any of the provisions of this [fol. 345] chapter shall be subject to a fine of not less than fifty dollars ($50.00) and not more than two hundred dollars ($200.00), and to imprisonment in the county jail not exceeding three (3) months, in the discretion of the court. Any officer of election whose duty it is to hold the elections provided for, who willfully neglects, fails, or refuses to

open and hold said elections, in accordance with the requirements herein made, shall be guilty of a misdemeanor in office, and be subject to a fine of not less than five hundred dollars ($500.00) nor more than two thousand dollars ($2,000.00), and shall be removed from office, and in event the officer of election of any county neglects, fails, or refuses to hold the election provided for, the duties, responsibilities, and authority of such officer shall devolve upon the chairman of the commissioners of elections, who shall exercise, for the time being, the functions of said officer in holding that election. Acts 1890 (1st E.S.), Ch. 24, Sec. 19; impl. am. Acts 1907, Ch. 436, Secs. 1, 9-11, 19; Shan., Sec. 1257; Code 1932, Sec. 2070.)

Chapter 13

PROCEDURE IN VOTING PLACE—COUNTING OF BALLOTS

TCA 2-1301 HOURS OF ELECTION.—In all elections for electors for president and vice-president of the United States, governor, members of congress, members of the state legislature, judges of the supreme, appeals, chancery, and circuit courts, judges of the county court in those counties where county judges are elected, sheriffs, clerks of the circuit and county courts, registers, trustees, justices of the peace, constables, and district attorneys for the various judicial districts, the polls shall be opened at 9:00 a.m. and shall remain open continuously until 4:00 p.m. at which time they shall be closed, except in cities having a population of fifteen thousand (15,000) and over according to the federal census of 1950 or any subsequent federal census, in which cities the polls shall be opened at 9:00 a.m. and closed at 7:00 p.m., and the commissioners of election in any county may order polls in any heavily populated voting precinct suburban to such city to remain open until 7:00 p.m.

Provided, however, that the commissioners of election of any county may determine, subject to the approval of the county court of such county, the hours when the polls shall be opened and closed at the several precincts within said counties. Provided further, that in no event shall the polls in any precinct be kept open for a less number of hours

than they were at the last general election before April 10, [fol. 346] 1953, and in no event for less than seven (7) hours, between the hours of 8:00 a.m. and 9:00 p.m.

Provided however, that the hours shall be set at least fifteen (15) days before the date of the election. (Acts 1859-1860, Ch. 75; 1909, Ch. 156, Sec. 1; Shan., Sec. 1282; mod. Code 1932, Sec. 2090; mod. C. Supp. 1950, Sec. 2090; Acts 1953, Ch. 266, Sec. 1.)

TCA 2-1304 "BALLOT BOX" DEFINED.—The ballot box is any receptacle provided by the officer or person holding an election for receiving the ballots, which box is to be kept locked, or otherwise well secured, until the election is finished. (Code 1858, Sec. 848 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 2); Shan., Sec. 1266; Code 1932, Sec. 2074.)

TCA 2-1305 METAL BALLOT BOXES TO BE FURNISHED—LOCKED DURING VOTING.—In all elections, both general and primary, held in the state of Tennessee for any state, county, municipal or federal office the election official shall be required to furnish for the voters, and the votes shall be placed in, standard metal boxes provided with good and sufficient locks except where voting is done by the use of voting machines. Said standard metal boxes shall be of such dimensions as may be prescribed by the body charged with conducting said election, and the type lock to be used shall be prescribed by the body conducting said election in each county of this state. All such metal boxes shall be locked on the date of election prior to any ballot being placed in same by the precinct official charged with the conducting of said election and shall remain locked throughout the period while ballots may be cast and shall not be opened until the count of the votes is commenced. The state of Tennessee shall bear the cost of providing the ballot boxes required by this section. (Acts 1949, Ch. 217, Sec. 1; C. Supp. 1950, Sec. 2074.1.)

TCA 2-1306 BALLOT BOXES—VIOLATIONS RESPECTING—PENALTY.—Any person who violates any provision of Sec. 2-1305 shall upon conviction thereof be fined not more than one thousand dollars ($1,000.00) or imprisoned not more than one (1) year and one (1) day, or both, in the discretion of the jury. (Acts 1949, Ch. 217, Sec. 1; C. Supp. 1950, Sec. 2074.2.)

TCA 2-1307 DELIVERY OF BALLOT TO OFFICIAL BY VOTER.—Every person qualified to vote, in the manner directed by the Constitution, who shall attend for that purpose at any election, shall give to the returning officer, in presence of the inspectors or judges, a ballot to be put [fol. 347] into the box. (Code 1858, Sec. 849 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 3); Shan., Sec. 1267; Code 1932, Sec. 2075.)

TCA 2-1308 BALLOT RECEIVED AND PLACED IN BOX WITHOUT EXAMINATION.—The returning officer shall receive the ballot in the presence of the judges, and, if the right of the person presenting it to vote is unquestioned, he shall not open and examine, or read the ballot at the time of receiving it, and before he puts it in the box. (Code 1858, Sec. 850 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 2; 1831, Ch. 98, Sec. 1); impl. am. Acts 1907, Ch. 436, Secs. 11, 14; Shan., Sec. 1268; Code 1932, Sec. 2076.)

TCA 2-1309 OATH OF CHALLENGED VOTER.—If any person offer to vote, and none of the judges knows that he is a qualified voter, or if his vote is objected to by any candidate or other citizen of this state, the judges of the election, or some one of them, or the officer or person holding the election, may, under the direction of the judges, or a majority of them, administer an oath in the following form, or to the following effect: "You do solemnly swear or affirm that you will true answers make to such questions as may be asked you touching your qualifications, or right to vote in the present election. So help you God." (Code 1858, Sec. 852 (deriv. Acts 1841-1842, Ch. 31, Sec. 6); Shan., Sec. 1270; Code 1932, Sec. 2078.)

TCA 2-1310 QUESTIONING CHALLENGED VOTER —TESTIMONY OF BYSTANDERS.—The judges, or some of them, shall then ask the person offering to vote the following questions: Are you a citizen of the state of Tennessee? Are you twenty-one (21) years of age? Do you reside in this county? Has your home been in this county six (6) months (next) before this day (the day of holding the election)? Have you voted at any other time or place in this election? And any other questions the judges may think material to ascertain the qualification of the person offering

to vote. And if they, or any one of them, have reason to suspect that the person offering to vote has sworn falsely, they, or the officer, or some justice of the peace under their direction, may swear any bystander as to the right and qualification of such person to vote. (Code 1858, Sec. 853 (deriv. Acts 1841-1842, Ch. 31, Sec. 6); Shan., Sec. 1271; Code 1932, Sec. 2079.)

TCA 2-1311 RECEIVING VOTE OF CHALLENGED VOTER.—The said questions having been asked and answered, and the testimony of bystanders taken if desired, if the judges or a majority of them are satisfied that the person offering to vote is a citizen of this state, that he is [fol. 348] twenty-one (21) years of age, that he has had his home in the county in which he offers to vote six (6) months next preceding, that he has not voted before at the same election, and that he is otherwise qualified, the judges shall thereupon receive his vote. (Code 1858, Sec. 854 (deriv. Acts 1841-1842, Ch. 31, Sec. 6); Shan., Sec. 1272; Code 1932, Sec. 2080.)

TCA 2-1316 LISTING VOTERS UPON CALLING OF NAMES.—When the officer receives the ballot, he shall call the name of the voter, in a distinct voice, and the clerks of the election shall take down, on separate lists or books, the name of every person voting, and shall attest the correctness of them under their hands. (Code 1858, Sec. 859 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 3; 1841-1842, Ch. 31, Sec. 11); Shan., Sec. 1277; Code 1932, Sec. 2085.)

TCA 2-1317 COUNTING OF VOTES AFTER CLOSING OF POLLS.—The officer or person and judges appointed to hold an election shall not proceed to or commence counting out the votes given in the election, until the polls shall have been closed. (Code 1858, Sec. 860 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 3); Shan., Sec. 1278; Code 1932, Sec. 2086.)

TCA 2-1318 READING OFF VOTES AND NUMBERING BALLOTS.—When the election is finished, the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear in

each ballot, and the clerks, at the same time, shall number the ballots, each clerk separately. (Code 1858, Sec. 861 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 3); Shan., Sec. 1279; Code 1932, Sec. 2087.)

TCA 2-1319 TICKETS ROLLED TOGETHER VOID.—If there be two (2) tickets rolled up together, such ticket shall not be numbered in taking the ballots, but shall be adjudged void. (Code 1858, Sec. 862 (deriv. Acts 1796 (Mar.), Ch. 9, Sec. 3); Shan., Sec. 1286; Code 1932, Sec. 2088.)

TCA 2-1320 REMOVAL OF BALLOT BOX PROHIBITED.—It shall be unlawful for the election officers or any other person to remove the ballot box used in any general or primary election from the place where such election is held, from the opening of the polls for such election or primary until the votes cast therein have been duly counted and tabulated. (Acts 1947, Ch. 157, Sec. 1; C. Supp. 1950, Sec. 2090.1.)

TCA 2-1321 BLANK SPACES ON POLL BOOKS OR TALLY SHEETS CANCELED BY CLERK.—Each clerk [fol. 349] of election shall at the completion of the counting of the votes cast in any election or primary cancel all vacant or blank spaces upon the poll books and/or tally sheets used therein in such manner as that no additional names may be written therein. (Acts 1947, Ch. 157, Sec. 2; C. Supp. 1950, Sec. 2090.2.)

TCA 2-1322 PENALTY FOR VIOLATIONS OF SECTIONS 2-1320 AND 2-1321.—Any person violating any of the provisions of Secs. 2-1320, 2-1321 shall be guilty of a misdemeanor and punishable accordingly. (Acts 1947, Ch. 157, Sec. 3; C. Supp. 1950, Sec. 2090.3.)

TCA 2-1323 INSPECTORS—POWERS OF PEACE OFFICER.—The inspectors have authority to maintain regularity and order in the balloting; to keep access to the polls free and unobstructed; to prevent all disorderly and riotous conduct during the election, and during the counting of the votes, after the polls are closed; and, for this purpose, they are vested with all the power of a peace officer. (Code 1858, Sec. 863; Shan., Sec. 1281; Code 1932, Sec. 2089.)

Chapter 14

COMPARISON OF POLLS AND RETURNS

TCA 2-1403 FAILURE TO DELIVER ELECTION RETURNS—PUNISHMENT.—Any election officer who fails, or refuses, or willfully neglects to deliver the returns from his precinct to the county election commissioners within the time required by Sec. 2-1402, shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars ($100.00) and not more than one thousand dollars ($1,000.00) and sixty (60) days imprisonment, within the discretion of the court. (Acts 1949, Ch. 215, Sec. 2; C. Supp. 1950, Sec. 1991.1 (Williams, Sec. 1991.2.)

TCA 2-1426 POLL BOOKS—PRESERVATION AND CERTIFICATION.—The judges at every election shall preserve the poll books, or lists of the names of voters, kept by the respective clerks; and said judges, or a majority of them, shall certify that the same do contain a true list of the voters at the respective places of holding elections, which certificate shall be attested by the clerks and officer or person holding the election. (Code 1858, Sec. 867 (deriv. Acts 1841-1842, Ch. 31, Sec. 10); Shan. Sec. 1287; Code 1932, Sec. 2094.)

TCA 2-1427 POLL BOOKS ARE RECORDS—RECEIVED IN EVIDENCE.—Said books or lists, or copies of them, certified by the officer having custody of them, shall [fol. 350] be records, and be received as evidence in any case arising out of said election, subject to be impeached, however, by other evidence. (Code 1858, Sec. 869 (deriv. Acts 1841-1842, Ch. 31, Sec. 10); Shan., Sec. 1289; mod. Code 1932, Sec. 2095.)

Chapter 15

VOTING MACHINES

TCA 2-150[illegible] DEFINITIONS.—1. The word "ballot" or "ballot labels" as used in this chapter shall be defined as that portion of the cardboard, paper or other material, within the ballot frames, containing the names of the candidates, party designation or a statement of a proposed

constitutional amendment or other question or proposition, with the word "yes" for voting for any question or the word "no" for voting against any question.

2. The term "question" means a statement of any constitutional amendment, proposition or other question appearing on the machine and to be submitted to the voters at any election.

3. The term "irregular ballot" means the vote cast for, or on a special device for, a person whose name does not appear on the ballot labels.

4. The term "protective counter" means the separate counter built into the voting machine which cannot be reset, and which records the total number of movements of the operating lever.

5. The term "public counter" means the counter, visible from the outside of the machine, which shows during any period of voting the total number of voters who have operated the machine during said period of voting. (Acts 1937, Ch. 159, Sec. 29; C. Supp. 1950, Sec. 2111.1 (Williams, Sec. 2111.29).)

TCA 2-1502 SPECIFICATIONS OF VOTING MACHINE.—A voting machine to be used in Tennessee must be so constructed as to provide facilities for voting for candidates at both primary and general elections or at a non-partisan election and also at a combination of non-partisan and partisan primary or general election. It must permit a voter to vote for any person for any office whether or not nominated as a candidate by a party or organization. It must insure voting in absolute secrecy. It must permit a voter to vote for any candidate or on any special measure for whom or on which he is lawfully entitled to vote but none other. It must permit a voter to vote for the proper number of candidates for an office but no more. It must prevent the voter from voting for the same person twice. [fol. 351] It must be provided with a lock or locks by which immediately after the polls are closed any movement of the voting or registering mechanism can be absolutely prevented. (Acts 1937, Ch. 159, Sec. 1; C. Supp. 1950, Sec. 2111.2 (Williams, Sec. 2111.1.).)

TCA 2-1507 FORM OF BALLOTS ON VOTING MACHINES.—All ballots (or ballot labels) shall be printed in black ink on clear, white material of such size as will fit the ballot frame and in as plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such parties. The titles of offices may be arranged horizontally with the names of the candidates arranged vertically under the title of the office, or the titles of the offices may be arranged vertically with the names of the candidates arranged horizontally opposite the respective titles and each office shall as nearly as the construction of the machine permits occupy as many columns or rows on the machine as equals the number of candidates to be nominated or elected to that office. The arrangement of the names of the candidates and the offices shall be as uniform as practicable and if not specifically provided for herein, the names of the candidates shall be so arranged as to comply with all requirements of the election law governing the use of paper ballots. The machine shall be so adjusted that when one (1) or more voting pointers equalling the total number of persons to be elected to that office shall have been operated all other voting pointers connected with that office shall be thereby locked. (Acts 1937, Ch. 159, Sec. 6; C. Supp. 1950, Sec. 2111.7 (Williams, Sec. 2111.6).)

TCA 2-1508 SAMPLE BALLOTS.—The authorities charged with the duty of providing ballots for any polling place where voting machines are used shall provide therefor two (2) sample ballots which shall be arranged in the form of a diagram showing such part of the face of the voting machine as shall be in use at that election. Such sample ballots shall be either in full or reduced size and shall contain suitable illustrated directions for voting on the voting machine. Such sample ballots shall be open to public inspection at such polling place during election day. At all elections where voting machines are used there may be mailed to each registered voter such sample ballot of a reduced size at least three (3) days prior to the election or in lieu thereof a copy of such sample ballot may be published at least three (3) days preceding the election in the

local newspaper. (Acts 1937, Ch. 159, Sec. 7; C. Supp. 1950, Sec. 2111.8 (Williams, Sec. 2111.7).)

[fol. 352] TCA 2-1509 PREPARATION OF MACHINES FOR ELECTION.—It shall be the duty of the commissioners of elections or other authority in direct charge of elections in every city, county, and town where voting machines are to be used to cause the proper ballot labels to be placed on the voting machines and to place said machines in proper order for voting. Further, said authorities shall examine all voting machines before they are sent out to the different polling places, to see that all the registering counters are set at zero (000), to lock all voting machines so that the counting mechanism cannot be operated and to seal each one with a numbered metal seal.

Before preparing the voting machines for any election written notices shall be mailed to the chairmen of the county committees of the different political parties stating the times when and place or places where the machines will be prepared, at which times and place or places one representative of each of such political parties designated by the respective chairmen of the county committees of such parties shall be entitled to be present and see that the machines are properly prepared and placed in proper condition and order for use at the election. When the machines have been prepared for election it shall be the duty of the custodians, hereinafter provided for, and the party representatives, to make a certificate in writing which shall be filed in the office of the commissioners of elections or other authority in charge of elections, stating the number of machines, whether or not all of the machines are set at zero (000), the number registered on the protective counters and the number on the metal seal with which the machine is sealed. (Acts 1937, Ch. 159, Sec. 8; C. Supp. 1950, Sec. 2111.9 (Williams, Sec. 2111.8); impl. am. Acts 1953, Ch. 88, Sec. 11.)

TCA 2-1512 EQUIPMENT FURNISHED FOR MACHINE.—Every voting machine shall be furnished with an electric light or a proper substitute for one which shall give sufficient light to enable the voters while in the booth to read the ballot labels and suitable for the use of election

officers in examining the counters. All voting machines used in any election shall be provided with a curtain or other equipment so as to completely conceal the voter and his action while voting. (Acts 1937, Ch. 159, Sec. 11; C. Supp. 1950, Sec. 2111.12 (Williams, Sec. 2111.11).)

TCA 2-1513 INSTRUCTION OF ELECTION OFFICIALS—CERTIFICATE OF QUALIFICATION—NUMBER OF OFFICIALS PER PRECINCT.—As soon as practicable after the installation of voting machines in any [fol. 353] city, county, or town, and at least ten (10) days prior to the next succeeding primary or election and every general election thereafter there shall be held, under the direction of the commissioners of elections or other authority in charge of elections, a meeting for the purpose of instructing the judges of the election with the operating mechanism of the voting machines and the duties of the election officers during an election. Each judge of an election who has received such instruction and is fully qualified to properly conduct an election with the machine shall be given a certificate to that effect. For the purpose of giving such instructions the commissioners shall call such meeting or meetings of the judges of election as shall be necessary. The judges of election of each election precinct where machines are to be used shall attend such meeting or meetings and each judge shall receive for the time spent in receiving such instructions and qualifying to serve at an election one dollar ($1.00) in addition to car or railroad fare in going to and returning from each meeting. No judge of election shall serve at any election unless he shall have received such instruction and is fully qualified to perform his duties and has received a certificate to that effect, signed by one of the commissioners of elections or authorized representative. In precincts where voting machines are used four (4) election officials shall be appointed, provided that in precincts wherein two (2) voting machines are required five (5) election officials shall be appointed and that in precincts wherein three (3) voting machines are required six (6) election officials shall be appointed for each of such precincts. (Acts 1937, Ch. 159, Sec. 12; C. Supp. 1950, Sec. 2111.13 (Williams, Sec. 2111.12); impl. am. Acts 1953, Ch. 98, Sec. 11.)

TCA 2-1514 INSTRUCTION FACILITIES PROVIDED FOR VOTERS.—It shall be the duty of the commissioners of elections or other authority in charge of elections in every city, county, or town where voting machines are used to provide adequate facilities for the instruction of voters prior to an election and they shall cause to be placed in one or more convenient public places a voting machine with sample ballot labels affixed for the purpose of instructing voters in the operation of the machine. If the ballot labels that are used for this purpose are the same that will be used for the succeeding election the counting mechanism of the machine shall be concealed from view until the machine is prepared for the election and if the machine or machines are not to be used at the election the counting mechanism shall remain concealed from view until after [fol. 354] the election. (Acts 1937, Ch. 159, Sec. 13; C. Supp. 1950, Sec. 2111.14 (Williams, Sec. 2111.13); impl. am. Acts 1953, Ch. 88, Sec. 11.)

TCA 2-1515 ELECTION SUPPLIES—DELIVERY.—The supplies for the election shall be delivered to the judges of each election precinct on or before the day of election. (Acts 1937, Ch. 159, Sec. 14; C. Supp. 1950, Sec. 2111.15 (Williams, Sec. 2111.14).)

TCA 2-1516 INSTRUCTION CARDS AND SAMPLE BALLOTS—POSTING.—The election officers of each election precinct shall meet at the polling place at least one-half (½) hour before the time for opening the polls of the election. The judges shall cause to be posted conspicuously within the polling place the two (2) instruction cards and sample ballots showing a diagram of the face of the voting machine and shall perform such other preliminary duties as is prescribed by law. (Acts 1937, Ch. 159, Sec. 15; C. Supp. 1950, Sec. 2111.16 (Williams, Sec. 2111.15).)

TCA 2-1517 EXAMINATION AND FINAL PREPARATION OF MACHINES BY JUDGES BEFORE OPENING POLLS.—The keys to the voting machine shall be delivered to the judges at least one-half (½) hour before the time set for opening of the polls in a sealed envelope on which shall be written or printed the number and location of the voting machine, the number of the seal and the

number registered on the protective counter as reported by the voting machine custodian. The envelope containing the keys shall not be opened until the election officers of said precinct have examined the same to see that it has not been opened and shall further ascertain that the number registered on the protective counter and the numbers on the seals with which the machine is sealed correspond with the numbers written on the envelope containing the keys. If the envelope has been torn open, or if the numbers do not correspond, or any other discrepancy is found, it shall be the duty of the election officers to immediately acquaint the voting machine custodian or other authorized person with the facts who shall present himself at the polling place for the purpose of re-examining such machine and shall certify that it is properly arranged. If the numbers on the seals and the protective counter are found to agree with the numbers on the envelope, the judges shall then open the door concealing the counters and carefully examine every counter to see that it registers zero (000) and shall also allow the watchers to examine them. The judges shall then sign a certificate showing the delivery of the keys in a sealed envelope, the number on the seal, the number registered on [fol. 355] the protective counter, that all the counters are set at zero (000), and that the ballot labels are properly placed in the machine; provided that if any counter is found not to register at zero (000) and if it shall be impracticable for the custodian to arrive in time so as to adjust the counters before the time set for opening the polls, the judges shall immediately make a written statement of the designating letter and number of such counter together with the number registered thereon, and shall sign and post the same upon the wall of the polling place where it shall remain throughout the election day, and in filling out the statement of canvass they shall subtract such number from the number then registered on such counter. (Acts 1937, Ch. 159, Sec. 16; C. Supp. 1950, Sec. 2111.17 (Williams, Sec. 2111.16).)

TCA 2-1518 MANAGEMENT OF AND ATTENDANCE ON MACHINE DURING VOTING.—One judge shall attend the voting machine, the other officers shall attend the poll books and shall perform the usual duties of

election officials as provided by law. The voting machine shall be so placed and protected that it shall be accessible to only one (1) voter at a time and in full view of all of the election officers and watchers at the polling place. The election officer attending the machine shall inspect the face of the machine after every voter has voted, to ascertain whether the ballot labels are in their proper places and that the machine has not been injured or tampered with. During elections the door or other compartment of the machine shall not be unlocked or opened or the counters exposed except by the custodian or other authorized person, a statement of which shall be made and signed by the custodian or authorized person and attached to the returns. (Acts 1937, Ch. 159, Sec. 17; C. Supp. 1950, Sec. 2111.18 (Williams, Sec. 2111.17).)

TCA 2-1519 MODEL OF MACHINE AT POLLS FOR VOTERS' INSTRUCTION—ASSISTANCE RENDERED VOTERS ON REQUEST.—For the instruction of voters there shall be, so far as practicable, in each polling place, a mechanically operated model of a portion of the face of the machine. Such model furnished shall be located during the election in some place which the voter must pass to reach the machine and every voter before operating the machine shall be instructed regarding its operation and such instruction illustrated on the model and the voter given opportunity to personally operate the model. The voter's attention shall also be called to the diagram of the face of the machine so that the voter can become familiar with the location of the questions and the names of the offices [fol. 356] and candidates. If any voter after entering the voting machine booth shall ask for assistance such assistance will be given as is provided by law governing the use of paper ballots. (Acts 1937, Ch. 159, Sec. 18; C. Supp. 1950, Sec. 2111.19 (Williams, Sec. 2111.18).)

TCA 2-1520 MANNER OF VOTING—TIME LIMIT—REMOVAL OF VOTER.—The election officers shall admit but one (1) voter to the voting machine at one (1) time and only after it has been ascertained that he is entitled to vote. The voting on the voting machine shall be secret except as provided in cases of voting by assisted voters and no voter

shall remain within the voting machine booth longer than (2) minutes and if he shall refuse to leave it after the lapse of two (2) minutes he may be removed by the judges. (Acts 1937, Ch. 159, Sec. 19; C. Supp. 1950, Sec. 2111.20 (Williams, Sec. 2111.19).)

TCA 2-1521 UNOFFICIAL BALLOTS—USE.—If the official ballots at an election precinct at which a voting machine is to be used are not delivered at the time required or if after the delivery they shall become lost, destroyed or stolen the election judges shall immediately notify the clerk or other authority under whose direction the ballots are printed who shall cause other ballots to be prepared, printed or written as nearly in the form of the official ballot as practicable. The judges shall cause such substituted ballots to be used in the same manner as the official ballots. (Acts 1937, Ch. 159, Sec. 20; C. Supp. 1950, Sec. 2111.21 (Williams, Sec. 2111.20).)

TCA 2-1522 MACHINE OUT OF ORDER—REPAIRING, SUBSTITUTING OR USING PAPER BALLOTS.—If any voting machine being used in any election shall become out of order during such election it shall be repaired if possible or another machine substituted as promptly as possible. But in case such repair or substitution cannot be made, paper ballots printed or written, of any suitable form, may be used for the taking of votes and for such purpose the reduced sample ballots may be employed. (Acts 1937, Ch. 159, Sec. 21; C. Supp. 1950, Sec. 2111.22 (Williams, Sec. 2111.21).)

TCA 2-1523 LOCKING MACHINE UPON CLOSE OF POLLS—CANVASS OF VOTES—PROCLAMATION OF VOTE.—As soon as the polls of the election are closed, the judges of election there at shall immediately lock and seal the voting machine against voting. The judges shall then sign a certificate stating that the machine has been locked against voting and sealed; the number of voters as shown on the public counter, the number on the seal, the number [fol. 357] registered on the protective counter, and that the voting machine is closed and locked. The judges shall then open the counter compartment in the presence of the

watchers and all other persons who may be lawfully within the polling places, giving full view of all the counter numbers. One of the judges shall, under the scrutiny of the judge of a different political party, in the order of the offices as their titles are arranged on the machine, read and announce in distinct tones the designating number and letter on each counter for each candidate's name, the result as shown by the counter numbers, and shall then read the votes recorded for each office on the irregular ballots. He shall also in the same manner announce the vote on each constitutional amendment, proposition or other question. The counters shall not in the case of presidential electors be read consecutively along the party row or column, but shall always be read along the office columns or rows, completing the canvass for each office. If a separate ballot in each party column or row entitled "presidential electors" is provided, a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors. The vote as registered shall be entered on the statements of canvass in ink by two (2) judges of opposite political faiths but not including the chairman, in the same order on the space which has the same designating number and letter, after which the figures shall be verified by being called off in the same manner from the counters of the machine by a judge of opposite political faith from the chairman. The return of the canvass shall then be filled out, which shall show the total number of votes cast for each office, the number of votes cast for each candidate, as shown on his counter, and the number of votes for persons not nominated, and the statement shall be signed by each judge. After proclamation of the vote, ample opportunity shall be given to any person lawfully present to compare the results so announced with the counter dials of the machine and any necessary corrections shall then and there be made by the board. If absentee voters' ballots have been voted, such ballots shall then be canvassed and tallied, the vote thereon for each candidate announced and added to the vote as recorded on the statement of votes cast by machine and a final proclamation made as to the total vote received by each candidate. Absentee voters' ballots and irregular ballots, inclosed in properly sealed packages respectively, and properly in-

dorsed shall be filed with the original statement of canvass. (Acts 1937, Ch. 159, Sec. 22; C. Supp. 1950, Sec. 2111.23 (Williams, Sec. 2111.22).)

[fol. 358] TCA 2-1525 STATEMENT OF CANVASS MADE OUT IN TRIPLICATE FORM.—In each election precinct where voting machines are used, statements of canvass shall be printed to conform with the type of voting machine used. The designating number and letter on the counter for each candidate shall be printed next to the candidate's name on the statements of canvass and shall provide for the entry of the number of votes for each candidate and the "yes" and "no" over each question; also for the absentee voters' ballots and total number of votes, by such ballots and by machine, for each candidate and upon each question. These statements shall be executed in triplicate in each election precinct and one (1) copy shall be delivered to the clerk of the township or city in which the election precinct is located, one (1) copy to the county clerk, commissioners of elections or other authority, as the governing body of the county, city or town may direct and one (1) copy shall be retained with the poll books and other election supplies. (Acts 1937, Ch. 159, Sec. 24; C. Supp. 1950, Sec. 2111.25 (Williams, Sec. 2111.24); impl. am. Acts 1953, Ch. 88, Sec. 11.)

TCA 2-1526 PERIOD MACHINES TO REMAIN LOCKED—PRESERVATION OF IRREGULAR BALLOTS.—The voting machine shall remain locked against voting for the period of thirty (30) days and as much longer as may be necessary or advisable because of any existing or threatened contest over the result of the election, except as provided by Sec. 2-1528 and except that it may be opened and all the data and figures therein examined upon the order of any court or judge of competent jurisdiction. Irregular ballots shall be preserved for six (6) months after such election and the packages thereof may be opened and the contents examined only upon order of a court or judge of competent jurisdiction, and after the expiration of such time, such ballots may be disposed of in the discretion of the officer or board having charge of them. (Acts 1937, Ch. 159, Sec. 25; C. Supp. 1950, Sec. 2111.26 (Williams, Sec. 2111-.25).)

TCA 2-1527 RETURN OF KEYS AT CLOSE OF ELECTION—CUSTODY OF VOTING MACHINES AND KEYS WHEN NOT IN USE.—At the close of the election the judges of each election precinct shall enclose the keys of the machine in an envelope on which shall be certified by the judges the number of the machine and the precinct and ward where it has been used, securely seal the envelope, indorse it and return it to the officer from whom the keys were received. The number on the seal and the number registered on the protective counter shall be written on the [fol. 359] envelope containing the keys. The local authorities adopting the machines shall have the custody thereof when not in use at an election and shall preserve and keep them in repair. All keys for voting machines shall be securely locked by the officers having them in charge. A public officer, who by any provision of law is entitled to the custody of the machine for any period of time, shall be entitled to the keys therefor of such machines in his charge. It shall be unlawful for any unauthorized person to have in his possession any key or keys of any voting machine; and all election officers or persons intrusted with such keys for election purposes or in the preparation of the machine therefor, shall not retain them longer than necessary to use them for such legal purpose. (Acts 1937, Ch. 159, Sec. 26; C. Supp. 1950, Sec. 2111.27 (Williams, Sec. 2111.26).)

TCA 2-1533 OFFICIALS PROHIBITED FROM INFLUENCING VOTERS—PERMISSIBLE INSTRUCTING.—It shall constitute a misdemeanor for any officer of said elections to go behind the curtains of the voting machines while any individual, not physically handicapped to such an extent as to be unable to operate the machine, is voting, or for any officer of said elections to influence, or attempt to influence, a voter at said election, provided, however, such officer may fully instruct any individual upon request as to the operation of said machine prior to the closing of the curtain on said machine. (Acts 1937, Ch. 159, Sec. 35, as added by Acts 1949, Ch. 122, Sec. 1; C. Supp. 1950, Sec. 2111.33 (Williams, Sec. 2111.34).)

TCA 2-1534 DISTRIBUTION OF COPIES OF CHAPTER.—It shall be the duty of the officers holding any of the

aforesaid elections to distribute copies of this chapter with the other election papers now provided. (Acts 1937, Ch. 159, Sec. 36, as added by Acts 1949, Ch. 122, Sec. 1; C. Supp. 1950, Sec. 2111.34 (Williams, Sec. 2111.35).)

TCA 2-1535 VIOLATIONS PUNISHABLE AS MISDEMEANORS.—Any violations of this chapter shall be a misdemeanor, and upon conviction shall be punishable as such. (Acts 1937, Ch. 159, Sec. 37, as added by Acts 1949, Ch. 122, Sec. 1; C. Supp. 1950, Sec. 2111.35 (Williams, Sec. 2111.36).)

Chapter 16

ABSENTEE VOTING

TCA 2-1601 PURPOSE OF CHAPTER—RECEIVING OF BALLOTS REGULATED.—It is declared to be the intent of the general assembly in the passage of this chapter to prevent fraud in elections by the use of absentee [fol. 360] voters' ballots and for this purpose the judges of elections and/or the primary election officers shall receive no absentee voter's ballot unless the provisions of this chapter shall have been literally complied with, all regulatory provisions hereof being made mandatory, except as herein otherwise expressly provided. (Acts 1949, Ch. 164, Sec. 1; C. Supp. 1950, Sec. 2253 (Williams, Sec. 2253.16).)

TCA 2-1602 REQUISITES TO VOTING AS ABSENTEE.—Any qualified voter of the state of Tennessee, or the wife of any such voter accompanying her husband, who by reason of business, occupation, health, education, or travel, is required to be, or who expects to be absent from the county in which such voter is entitled to vote on the day of any election or primary election, or any voter who, by reason of illness or physical disability, upon satisfactory proof of such illness or disability and inability to appear at his or her voting precinct, is authorized to and may vote in any and all elections (local, primary, general, state, federal and special) held in said voter's precinct for any purpose whatever. (Acts 1949, Ch. 164, Sec. 2; C. Supp. 1950, Sec. 2253.2 (Williams, Sec. 2253.17).)

TCA 2-1603 NOTICE OF INTENTION OR DESIRE TO VOTE BY ABSENTEE BALLOT—CONTENTS—FORM.—Such voter shall give notice, in writing, of his or her intention or desire to vote under the provisions of this chapter, to the commissioners of elections of his or her county. This notice shall include a statement that said voter will be or expects to be absent from the county on the day of the election or primary election, or shall be unable to appear at the polls on the day of the election or primary election because of his or her physical disability. Such notice shall be given to the commissioners of elections not more than forty (40) days nor less than five (5) days prior to such election or primary election if the voter be within the limits of the United States or its possessions, and not more than ninety (90) days nor less than twenty (20) days, if the voter be outside the limits of the United States or its possessions. Such notice shall set out the kind of election, the date thereof, the precinct, city, district and county in which the voter will vote, and the address to which the voter desires the ballot to be sent to him or her if to be sent by mail, or whether the ballot is to be delivered to the voter in person, and such notice may be delivered personally or by mail, by the voter to the commissioners of elections. Provided, that any voter, giving notice of her or his desire to vote by absentee ballot, while within the county, because of illness or physical disability, shall attach to said notice a statement from a licensed physician certifying that the [fol. 361] illness or disability of said voter is such that said voter cannot safely appear at the voting precinct in person. (Acts 1949, Ch. 164, Sec. 3; C. Supp. 1950, Sec. 2253.3 (Williams, Sec. 2253.4).)

TCA 2-1604 MAILING OF BALLOT UPON DETERMINATION OF ELIGIBILITY—CERTIFICATE ON ENVELOPE, FORM—INSTRUCTIONS.—The commissioners of elections shall, upon receipt of such notice, endorse upon same the date of its receipt, manner of receipt (whether by personal delivery or by mail), and shall compare the signature on the application with that of the voter on the registration record card, and endorse on the application a statement that they are, or are not, the same. Com-

missioners of elections shall, in formal meeting if they disapprove the application, endorse the reason for disapproval thereon and shall notify the applicant of such action; but, if the applicant is found to be entitled to vote and to secure a ballot as provided by the election laws, the commissioners of elections shall approve the application and endorse upon same the approval and the method of delivery, personally or by mail, and the date of delivery of the ballot, and shall as requested by the voter, deliver to the voter, either personally or by mail, all enclosed in the same envelope: (a) an official, numbered absentee ballot (all absentee ballots shall be numbered serially the commissioners of elections shall place upon the voter's application the number of the ballot sent to that voter); (b) an envelope to be used by the voter in returning to the commissioners of elections his prepared or marked ballot, which envelope shall have printed on the back thereof a certificate, substantially in form as follows: "I certify that I received the enclosed ballot as per my application; that the ballot was voted and marked or prepared by me or under my direction in the presence of the attesting official; that my name is .....

....., and that I am entitled to vote in the State of Tennessee, County of ....., City of ....., Ward or District No. ....., and Precinct ....., and that this ballot is being voted by me pursuant to the statutes of the State of Tennessee, this ..... day of ....., 19.....

Signed.....
Voter's Signature

[fol. 362] Attest:

(Signature of attesting official and official designation)" and which envelope shall have printed at the upper left-hand corner of the face thereof lines for the name and address of the voter and shall also have printed on the face thereof,

"County .....

City .....

Ward of District No. .....

Precinct .....

Kind of Election .....

Date of Election ....."

and shall be properly addressed to the commissioners of elections; and (c) a printed slip, giving full instructions, stating the offices to be filled, the number to be voted for in each instance, how to mark the ballot, and how it must be prepared and returned, and all other necessary information to enable the voter to cast a legal ballot under the election laws. (Acts 1949, Ch. 164, Sec. 4; C. Supp. 1950, Sec. 2253.4 (Williams, Sec. 2253.19).)

TCA 2-1605 RETENTION OF APPLICATIONS FOR BALLOTS.—All such notices or applications for ballots under this chapter shall be retained safely by the commissioners of elections for a period of thirty (30) days subsequent to the election, and such longer period of time as may be deemed necessary or required, and the same shall become a part of the public records system of the county, and shall be subject to inspection during the regular hours for business as maintained in other county offices. (Acts 1949, Ch. 164, Sec. 5; C. Supp. 1950, Sec. 2253.5 (Williams, Sec. 2253-.20).)

TCA 2-1606 PREPARATION OF BALLOT—MANNER—ADMINISTRATION OF OATH—RETURN OF BALLOT.—If the voter is absent from the county by reason of business, occupation, education or travel, upon receipt by mail of such ballot the voter shall take same before a postmaster or assistant postmaster, or any officer authorized to administer oaths, or a commissioned officer of the army, navy, air or marine corps (if the voter is in the military service), or an American consul or his assistant, and the ballot shall be prepared for voting in the presence of such official and with the assistance of such official, if re-[fol. 363] quested by the voter, and said ballot after being

so prepared shall then be placed in the envelope hereinabove described and provided for, and the envelope shall be carefully sealed and the certificate on the back of the envelope shall be filled out and the voter shall sign same, and the official before whom same was prepared shall attest the same by his signature and the official seal or stamp, if any, of the official shall be pressed or stamped on the back of such envelope, and such envelope containing the prepared ballot, and showing upon the face thereof the name of the voter, his or her address, and the precinct and the county at which such voter is voting, and being addressed to the commissioners of elections shall be sent by the voter to the commissioners of elections by registered mail.

If the voter is present in the county but by reason of illness or disability is unable to appear in person at the polls as provided in Section 2-1603, he or she shall, in the presence of an officer authorized to administer oaths, prepare and return the ballot to the commissioners of election in the manner set forth in the first paragraph of this section.

If the commissioners of elections, upon application, deliver the ballot to the voter personally, pursuant to the provisions of Secs. 2-1603, 2-1604, said voter may take the ballot before a postmaster or assistant postmaster, or any officer authorized to administer oaths, or may then and there, in the presence of the commissioners of elections or any one of them, prepare the ballot in the manner set forth in the first paragraph of this section, provided, that the voter need not return the sealed envelope containing the ballot to the commissioners of elections by registered mail if the commissioners of elections or any one of them is the attesting official to the affidavit on the back of said envelope. (Acts 1949, Ch. 164, Sec. 6; C. Supp. 1950, Sections 2253.6, 2253.7 (Williams, Sec. 2253.21).)

TCA 2-1608 LISTS OF ABSENTEE VOTERS—PUBLICATION OR POSTING—FAILURE PENALIZED.—At least ten (10) days prior to the election or primary election in which the absentee ballots are designed to be cast, the commissioners of elections shall cause to be published in a local newspaper, having general circulation in that county, a list of applicants for absentee ballots, and a supplemental list shall be so published on the fourth day prior to the

election or primary election. If there is no such newspaper, said list of applicants shall be posted in a conspicuous place at the courthouse and, in case of a municipal election, also at the city hall. Failure to publish or post such list shall not affect the validity of either a voter's ballot or the elec- [fol. 364] tion or primary election, but the commissioners of elections for such failure shall each be liable to indictment for a misdemeanor in office, and to be sentenced to pay a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), or imprisoned in the county jail or workhouse for not less than ten (10) days nor more than thirty (30) days or both in the discretion of the court. (Acts 1949, Ch. 164, Sec. 8; mod. C. Supp. 1950, Sec. 2253.8 (Williams, Sec. 2253.23).)

TCA 2-1609. VOTED ABSENTEE BALLOT—PROCEDURE UPON RECEIPT BY COMMISSIONERS—PROCEDURE UPON RECEIPT OF BALLOTS AT POLLS.—Upon the receipt by the commissioners of elections of any envelope containing the ballot being voted under the provisions of this chapter, they shall endorse on the envelope the date of its receipt, and shall properly preserve the same, without the envelope or its contents being altered, and without the same being out of his custody or possession. They shall on the day of the election or primary election and not later than the closing hour of the day of the election or primary election, deliver to the judges holding the election, or officers holding the primary election, at the respective precinct of his county all absentee ballots so received to be voted at such precinct, in a sealed container, upon which there shall be a certificate signed by the commissioners of elections, substantially in form as follows: "We hereby certify that we have received from the voters whose names appear thereon, through the United States mail or personally, all of the sealed envelopes contained in this sealed container, which are being delivered to ....., judges holding the ..... election (or officers holding the ..... primary election), held on this ..... day of .....

....., 19....., at Precinct ....., Ward or District No. ....., City of ....., County of ....., in the State of Tennessee, there being ..... sealed envelopes herein and that the same have not been out of our possession or altered since being received; that proper applications for such ballots were made by the voters; that the signature of each applicant is the same as his signature on the registration record [fol. 365] card; and in our opinion, the provisions of the statutes have been complied with by the voters, and that the within ballots are entitled to be voted in such election (or primary election).

Witness our hands this ..... day of ....., 19.....

(Signed) .....

.....

.....

Commissioners of Elections."

Provided, however, that more than one (1) sealed container, containing the voters' envelopes and ballots and having thereon such signed certificate, may be used in the delivery by the commissioners of elections of such envelopes containing ballots to the judges holding the election or officers holding the primary election at each precinct; and the election judges or primary officers, when receiving such sealed container, shall give to the commissioners of elections a receipt for the same, showing the condition of the container, and the date and hour of the receipt by them of such sealed container and they shall retain the same in their possession or custody without breaking the seal thereon, and without any alteration thereof or of the contents thereof, until the seal is broken in the presence of the judges and clerks of election or officers of the primary election immediately after the closing of the polls on the day of the election or primary election, at which time the sealed container or containers are to be opened by the judges of election or officers of the primary election in the presence of

all or a majority of the judges and clerks or officers, and as each envelope is removed, the name of the voter is to be called and checked as if the voter were present, voting in person, and the judges or officers shall compare the signature of the voter on the affidavit on the envelope with the signature of the voter on the registration record card. Where one or more primary elections are held at the same time as an election the officers of the primary election shall compare the signatures on the envelope with the corresponding signatures on the registration record cards, which are in the possession of the judges holding the election. And if the signatures are the same, and it is found that the voter is a qualified voter of the precinct, and that the voter is otherwise qualified and legally entitled to cast his or her ballot at the time and place where the ballot is thus offered, [fol. 366] and the voter has not at the same election or primary election cast ballot in person, the name of the voter shall be enrolled by the clerks upon the registration book, and the envelope shall then be opened and the folded ballot taken therefrom, the number torn off and the ballot deposited in the regular ballot box without being examined or unfolded, and shall be counted the same as if the voter had appeared and cast his or her ballot in person; but if the judges of election or officers of the primary election shall determine that the person thus offering to vote is not a qualified voter of the precinct and is not entitled to vote, or that the voter has cast a ballot in person at that same election or primary election, or if the signature on the envelope containing the ballot is not the same as the voter's signature on the registration record card, the envelope containing the ballot shall in no case be opened, but the same in its sealed condition shall be returned together with the other records of the election or primary election, as part thereof, and shall be preserved by the officers whose duty it is to have custody of said records; provided, however, that if the commissioners of elections shall fail or neglect to endorse upon any such envelope containing the voter's ballot the date of its receipt by him, the ballot shall not for that reason be rejected by the judges of the election or officers of the primary election; and provided, further, that it shall be lawful for the commissioners of elections, in the delivery

of the sealed containers containing the ballots being voted under the provisions of this chapter to the judges of election or officers of the primary election, to transmit same to such judges or officers by the same person or persons or agency hired by them to deliver the ballot boxes containing the ballots and other supplies for holding such election or primary election, and such person or persons or agency shall upon such delivery of the sealed containers, take from judges or officers a receipt for same, and return such receipt to the commissioners of elections; and provided, further, that the delivery by them of the sealed containers containing the voters' sealed envelopes and ballots being voted under this chapter, and their certification accompanying same as hereinabove provided shall be satisfactory evidence that the provisions of this chapter have been complied with by both the persons seeking to vote and by the commissioners of elections. (Acts 1949, Ch. 164, Sec. 9; C. Supp. 1950, Sec. 2253.9 (Williams, Sec. 2253.24); mod. by 1953 amend. Const., Art. 4, Sec. 1.)

TCA 2-1610. ENVELOPES AND OTHER RECORDS PRESERVED—REJECTION OF BALLOTS, CERTIFI- [fol. 367] CATION OF REASONS.—When all ballots shall have been accounted for at the voting precinct, and either voted or rejected, the empty envelopes from which the voted ballots were taken, together with the sealed envelopes containing the rejected ballots, if any, together with all other records relating thereto, shall be made a part of the election or primary election records and certified to the county board of election commissioners, or to the county primary election boards, who shall preserve same in the manner provided by law for other records of election. The judges or primary officer, or a majority of them, shall certify their reason for rejecting each and every ballot rejected by them. (Acts 1949, Ch. 164, Sec. 10; C. Supp. 1950, Sec. 2253.10 (Williams, Sec. 2253.25).)

TCA 2-1611. PROCEDURE WHERE VOTING MACHINES ARE USED.—Where mechanical voting machines are authorized and used in a county, an official ballot box shall be furnished and used for the casting of absentee ballots for the purpose of preserving the secrecy of the

ballot. The absentee ballots shall be checked and cast or rejected in the same manner as hereinabove provided under the provisions of this chapter for the checking and casting or rejecting of absentee ballots where mechanical voting machines are not used, and the ballots thus cast shall be counted and tallied as under the general election laws of the state of Tennessee, and the tally totals thus obtained shall then be added to the returns taken from the counters of the mechanical voting machines. (Acts 1949, Ch. 164, Sec. 11; C. Supp. 1950, Sec. 2253.11 (Williams, Sec. 2253.26).)

TCA 2-1612. ABSENTEE VOTER DYING PRIOR TO ELECTION—DISPOSITION OF BALLOT—PENALTY FOR CASTING.—Whenever it shall be made to appear by due proof to the judges of elections or officers of the primary election that any voter who has marked and forwarded his ballot as provided in this chapter has died prior to the opening of the polls on the date of the election, or primary election, then the ballot of such deceased voter shall not be opened or cast, and the same shall be returned with the polls by the judges of election or officers of the primary election in the same manner as provided for rejected ballots in this chapter, but the casting of the ballot of a deceased voter shall not invalidate the election or primary election. But, where any judge of election or officer of a primary election shall knowingly or negligently allow a deceased voter's absentee ballot to be cast he shall be liable to indictment for a misdemeanor in office, and to be sentenced to pay a fine of not less than ten dollars ($10.00), nor more than fifty [fol. 368] dollars ($50.00), or imprisoned in the county jail or workhouse for not less than ten (10) nor more than thirty (30) days, or both, in the discretion of the court. (Acts 1949, Ch. 164, Sec. 12; C. Supp. 1950, Sec. 2253.12 (Williams, Sec. 2253.27).)

TCA 2-1614. RECEIVING ILLEGAL OR REJECTING LEGAL BALLOT PENALIZED.—It shall be a misdemeanor for the judges of election or officers of the primary election to receive and permit to be voted a ballot from any person who is not a qualified voter, or to reject a ballot from any person who is a qualified voter who has substantially complied with the provisions of this chapter,

and upon conviction such judges or officers shall be punished as in other misdemeanor cases. (Acts 1949, Ch. 164, Sec. 14; C. Supp. 1950, Sec. 2253.14 (Williams, Sec. 2253.29).)

TCA 2-1615. ILLEGALLY VOTING, ATTEMPTING TO DO SO OR AIDING AND ABETTING A FELONY.—It shall be a felony for any person who, for any reason, is not legally entitled to vote at the time and place where he votes or attempts to vote under this chapter, to vote or offer to do so; and it shall be a felony for any person to aid or abet another in voting illegally or offering to do so, with knowledge of such illegality, and upon conviction such person or persons shall be confined to the penitentiary for not less than one (1) year nor more than three (3) years, or, in the discretion of the jury, may be fined or confined in the county jail or workhouse, or both, and the venue shall be in the county where the legal ballot is cast or offered to be cast, without reference to the place where it was prepared or mailed. (Acts 1949, Ch. 164, Sec. 15; C. Supp. 1950, Sec. 2253.15 (Williams, Sec. 2253.30).)

TCA 2-1616. ELECTION OFFICIALS FAILING TO PERFORM DUTIES OR ACTING FRAUDULENTLY PENALIZED.—It shall be a felony for any of the election or primary election officials connected in any way with the casting of a ballot under the provisions of this chapter, to wilfully or fraudulently fail to perform any act required of him hereunder, or to do any act in connection therewith for the fraudulent purpose of preventing a legal voter from casting his ballot, or of causing an illegal ballot to be cast or offered to be cast, or in any way or manner to do any act fraudulently which may be calculated to affect the result of the election or primary election, and upon conviction such persons shall be punished as provided in Sec. 2-1615. Any conviction hereunder shall carry with it a judgment of infamy and a disqualification for the holding of any pub-[fol. 369] lic office or place of trust under the laws of Tennessee, or exercising the elective franchise in Tennessee. (Acts 1949, Ch. 164, Sec. 16; C. Supp. 1950, Sec. 2253.16 (Williams, Sec. 2253.31).)

Chapter 22

PENAL PROVISIONS

TCA 2-2201. BREAKING UP ELECTION—PUNISHMENT.—If any person by force or violence break up or attempt to break up any legalized political convention, primary or final election, by assaulting the officers thereof, or by destroying or carrying off the ballot box, or by the use of other forcible or violent means to prevent a nomination being fairly made, or election from being fairly and legally conducted, he shall be guilty of a misdemeanor. (Code 1858, Sec. 4901 (deriv. Acts. 1799, Ch. 17); Shan., Sec. 6848; Mod. Code 1932, Sec. 11317.)

TCA 2-2202. PENALTIES ON OFFICERS HOLDING ELECTIONS—QUI TAM ACTION.—If any person holding an election refuse to deliver to a person elected to any office a fair copy of the list of votes, when demanded according to law, or hold an election in any other manner than as directed by law, or neglect to make or to forward due returns thereof, he shall forfeit and pay the sum of five hundred dollars ($500), to be recovered by action of debt in any court of record having cognizance thereof, with costs, one-half (½) to the use of the state, the other half to such person who sues for the same. (Code 1858, Sec. 936 (deriv. Acts 1796 (Mars.), Ch. 9, Sec. 9); Shan. Sec. 1374; Code 1932, Sec. 2176.)

TCA 2-2203. MISDEMEANORS BY OFFICERS HOLDING ELECTIONS.—It shall be a misdemeanor—

(1) For such officer to fail or refuse to administer the oaths, or any of them, required by law in elections.

(2) To set aside any judge regularly appointed to preside at such election, or to fail or refuse to administer the oaths prescribed for the judges of an election, they being present, willing and not incompetent to serve as judges of the election.

(3) Or to fail to perform any duty required of him in regard to any election.

(4) Or for any judge or clerk of an election to violate any of the provisions of the law to preserve the purity of [fol. 370] elections. (Code 1858, Sec. 937 (deriv. Acts 1841-42, Ch. 31, Sec. 8, 9, 12); Shan., Sec. 1375; Code 1932, Sec. 2177.)

TCA 2-2204. OFFICER VIOLATING ELECTION LAW.—Any judge, clerk, or executive officer who willfully or fraudulently violates any of the provisions made for the protection of primary or final elections, is guilty of a misdemeanor. (Code 1858, Sec. 4910 (deriv. Acts 1841-1842, Ch. 31, Sec. 8, 12); Shan., Sec. 6857, mod. Code 1932, Sec. 11326.)

TCA 2-2205. BRIBING OFFICER OF ELECTION.—If any person give, or offer to give a bribe to any clerk or canvasser of any primary or final election, or any executive officer, attending the same, as a consideration for any act done or omitted to be done contrary to his official duty in relation to such primary or final election, he shall be guilty of a misdemeanor. (Code 1358; Sec. 4904; Shan., Sec. 6851; mod. Code 1932, Sec. 11320.)

TCA 2-2206. APPROACHES CLOSE TO BALLOT BOX.—It shall be a misdemeanor for any person, except officers holding elections, to approach nearer to any voter or to any ballot box, than thirty (30) feet, when said voter is in the act of casting his ballot or offering or proposing to vote in any primary or final election. (Acts 1901, Ch. 142, Sec. 1; Shan., Sec. 6868A8; mod. Code 1932, Sec. 11338.)

TCA 2-2207. ILLEGAL VOTING.—It shall be a misdemeanor for any person knowingly to vote in any political convention or any election held under the Constitution or laws of this state, not being legally qualified to vote; or to vote under an assumed or fictitious name, whether such person be a qualified voter or not; or to vote more than once in the same or a different county or district. And any person convicted of any violation of any of said provisions shall be fined not less than fifty dollars ($50.00), or be confined in the county jail or workhouse not less than thirty (30) days or both, in the discretion of the court. (Code 1858, Sec. 938, 4896 (deriv. Acts 1841-42, Ch. 31, Sec. 1-4; 1853-

1854, Ch. 32, Sec. 8); Acts 1890 (1st E.S.), Ch. 25, Sec. 15; Shan., Sec. 1376, 6843; mod. Code 1932, Sec. 2178, 11312; modified.)

TCA 2-2208. PROCURING ILLEGAL VOTE.—It is a misdemeanor for any person to procure, aid, assist, counsel or advise another to give his vote in any convention, primary or final election, knowing such person is disqualified. (Code 1858; Sec. 4897; Shan., Sec. 6844; mod. Code 1932, Sec. 11313.)

[fol. 371] TCA 2-2209. FRAUDULENT VOTERS BROUGHT FROM ANOTHER STATE.—If any person bring or aid in bringing any fraudulent voters into this state for the purpose of practicing a fraud upon or in any primary or final election, such person shall, upon conviction, be imprisoned in the penitentiary not less than two (2) nor more than five (5) years. (Code 1858, Sec. 4909 (deriv. Acts 1841-42, Ch. 31, Sec. 19); Shan., Sec. 6856; mod. Code 1932, Sec. 11325.)

TCA 2-2210. PERJURY TO SWEAR OR AFFIRM FALSELY TO OATH.—It shall be perjury for any person, to whom an oath is legally administered in an election, knowingly or willfully to swear or affirm falsely. (Code 1858, Sec. 939 (deriv. Acts 1841-42, Ch. 31, Sec. 7); Shan., Sec. 1377; Code 1932, Sec. 2179.)

TCA 2-2211. VIOLENCE AND INTIMIDATION TO PREVENT VOTING.—It is a misdemeanor for any person, directly or indirectly, by himself or through any other person: By force or threats to prevent or endeavor to prevent any elector from voting at any primary or final election; or to make use of any violence, force or restraint, or to inflict or threaten the infliction of any injury, damage, harm or loss; or in any manner to practice intimidation upon or against any person in order to induce or compel him to vote or refrain from voting, to vote or refrain from voting for any particular person or measure, or on account of such person having voted or refrained from voting at any such election. (Acts 1897, Ch. 14, Sec. 4; Shan., Sec. 6868a5; mod. Code 1932, Sec. 11337.)

TCA 2-2216. BRIBING VOTERS.—It shall be unlawful for any person, directly or indirectly, by himself or through any other person:

(a) To pay, loan, contribute, or offer or promise to pay, loan, or contribute any money, property, or other valuable thing, to or for any voter, or to or for any other person, to induce such voter or any voter to vote or refrain from voting in any political convention, primary or final election of any kind or character, or to induce such voter or voters to vote or refrain from voting at any such convention, primary or final election for or against any particular person or measure, or on account of any voter having voted for or against any particular person or measure, or having gone to or remained away from the polls at any such convention, primary or final election.

(b) To give, offer, or promise any place, office or employment, or to promise or to procure any place, office or employment, to or for any voter, or to or for any other [fol. 372] person, in order to induce such voter to vote or refrain from voting at any convention, primary or final election, or to induce any voter at such convention or primary or final election to vote or refrain from voting for any particular person or measure.

(c) To advance or pay or cause to be paid any money or other valuable thing to or for the use of any voter, or to or for the use of any other person, with intent that the same or any part thereof shall be used in bribery at any primary or final election, or otherwise unlawfully used at, concerning, or in connection with any such primary or final election; or knowingly to pay or cause to be paid any money or other valuable thing in discharge or repayment of money or other valuable thing wholly or in part expended in bribery or other unlawful use at or in connection with any such primary or final election.

(d) To advance, pay or cause to be paid, as expenses or otherwise, to or for the use of any person, any money or other valuable thing, to induce such person or any person to work for, solicit or seek to influence votes for or against any particular person or measure, at or in connection with

any convention, primary or final election; to induce such person or persons to procure, solicit or influence any voter to attend, leave, or remain away from any such convention, primary or final election; or to pay or cause to be paid any money or other valuable thing to or for the use or benefit of any person in discharge or payment of or for time, labor, expenses, or services alleged to have been spent, performed, incurred, or rendered for or against any person, at or in connection with any such convention, primary or final election: Provided, this shall not include payment of expenses for soliciting attendance of any person upon party conventions, primaries, or final elections, and provided, further, nothing herein shall be construed to prohibit expenditures otherwise allowed by law. (Acts 1897, Ch. 14, Sec. 1; 1907, Ch. 402, Sec. I, Shan., Sec. 6868a1, 6868a18; mod. Code 1932, Sec. 11332.)

TCA 2-2217. VOTER ACCEPTING BRIBE.—It shall be unlawful for any person, directly or indirectly, by himself or through any other person:

(a) To receive, agree to receive, or contract for, before or during any primary or final election or convention provided by law, any money, gift, loan, or other valuable consideration, or any office, place or employment, for himself or for any other person, for voting or agreeing to vote, or [fol. 373] for going to or remaining or agreeing to remain away from the polls, or refraining or agreeing to refrain from voting for any particular person or measure, at or in connection with any such convention, primary or election.

(b) To receive any money or other valuable thing during or after any convention, primary or final election provided by law, on account of himself or any other person, for voting or refraining from voting for any person or measure, or for going to the polls or remaining away from the polls at any such convention, primary or final election, or on account of having induced any person to vote or refrain from voting for any particular person or measure at any such convention, primary or final election. (Acts 1897, Ch. 14, Sec. 2; 1907, Ch. 402, Sec. 2; Shan., Secs. 6868a2, 6868a19; mod. Code 1932, Sec. 11333.)

TCA 2-2218. OFFICER WRONGFULLY CASTING VOTE OF ANOTHER OR TAMPERING WITH ELECTION.—It shall be unlawful for any officer of any convention, primary or final election willfully to cast the vote of another or for some person or measure different from that person or measure sought to be voted for by the person voting, or falsely to cast such vote, in any way, or to insert a ballot for one (1) person or measure when the person voting sought to vote for another person or measure, or to change, falsify or tamper with the returns of any primary or final election. (Acts 1907, Ch. 402, Sec. 1; Shan., Sec. 6868a18; mod. Code 1932, Sec. 11332.)

TCA 2-2219. PENALTY FOR VIOLATION OF SECTIONS 2-2216–2-2218.—Any person convicted of any of the offenses mentioned in Sections 2-2216–2-2218 shall be punished by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the penitentiary for not more than five (5) years, or by both fine and imprisonment, in the discretion of the jury, and shall be disqualified from holding office or exercising the elective franchise for a period of six (6) years, and in addition thereto, any corporation violating any of the provisions of Section 2-2216, shall forfeit its charter and right to do business in this state. Said fines, when collected, shall be paid into the public school fund of the state. (Acts 1897, Ch. 14, Sec. 7; 1907, Ch. 402, Sec. 4; Shan., Secs. 6868a12, 6868a21; mod. Code 1932, Sec. 11334.)

TCA 2-2222. FURNISHING A FALSE TICKET OR BALLOT.—It is a misdemeanor for any person to furnish an elector in any primary or final election with a ticket or [fol. 374] ballot, representing to him that it contains a name or names different from those written or printed thereon, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully to change a ballot, whereby such elector is deprived of voting for such person as he intended. (Code 1858, Sec. 4898 (deriv. Acts 1851-1852, Ch. 34); Shan., Sec. 6845; mod. Code 1932, Sec. 11314.)

TCA 2-2223. ILLITERATE VOTER—WILLFUL IMPOSITION UPON A MISDEMEANOR.—Any person who shall willfully and knowingly impose upon any illiterate

voter a ticket, in any election, contrary to his wish and desire, by falsely representing to such voter that the ticket proposed to him is such as he desires, shall be guilty of a misdemeanor. (Code 1858, Sec. 851 (deriv. Acts 1851-1852, Ch. 34); Shan., Sec. 1269; Code 1932, Sec. 2077.)

TCA 2-2224. MAKING FALSE ENTRY OR BALLOT.—It is a misdemeanor for any judge or clerk of any primary or final election, knowingly to make or consent to any false entry on the list of voters or poll book, or put in the ballot box, or permit so to be put in, any ballot not given by a voter, or so take out of such box or permit to be taken out any ballot deposited therein, except in the manner prescribed by law, or by any other act or omission designedly to destroy or change the ballots given by the electors. (Code 1858, Sec. 4905; Shan., Sec. 6852; mod. Code 1932, Sec. 11321.)

TCA 2-2225. UNLAWFUL RECEIPT OR REJECTION OF VOTES.—When any person offering to vote at any primary or final election is objected to by an elector as not possessing the requisite qualifications, if any judge of such primary or final election unlawfully permit him to vote without proving his qualification in the manner prescribed by law, or if any judge willfully refuse the vote of any person who complies with the requirements prescribed by law to prove his qualifications, he is guilty of a misdemeanor. (Code 1858, Sec. 4906 (deriv. Acts 1841-1842, Ch. 31, Sec. 6, 8, 11); Shan., Sec. 6853; mod. Code 1932, Sec. 11322.)

TCA 2-2226. TAKING TICKET OUT OF BALLOT BOX.—If any person fraudulently take any ticket out of the ballot box after it has been received, in any nominating convention or primary or final election, or shall fraudulently or unlawfully put any ticket into such ballot box, he is guilty of a misdemeanor. (Code 1858, Sec. 4902 (deriv. [fol. 375] Acts 1841-1842, Ch. 31, Sec. 13.); Shan., Sec. 6849; mod. Code 1932, Sec. 11318.)

TCA 2-2227. OPENING TICKET BY OFFICER.—Any officer holding any primary or final election, who opens and examines or reads the ticket of any voter at such elec-

tion, shall be fined not less than twenty-five dollars ($25.00); and, if a constable or sheriff, shall be removed from office. (Code 1858, Sec. 4903 (deriv. Acts 1831, Ch. 98, Sec. 1); Shan., Sec. 6850; mod. Code 1932, Sec. 11319.)

TCA 2-2228. ILLEGAL ACT BY OFFICIAL CAUSING LOSS OF BALLOTS OR VOTES OR INVALIDATING ELECTION.—If any judge, clerk, or executive officer designedly omit to do any official act required by law, or designedly do any illegal act, in relation to any primary or final election, by which act or omission the votes taken at any such election in any city, town, district or precinct are lost, or the electors thereof deprived of their suffrage at such election, or designedly do any act which renders such election void, he is guilty of a misdemeanor. (Code 1858, Sec. 4907 (deriv. Acts 1841-1842, Ch. 31, Sec. 12); Shan., Sec. 6854; mod. Code 1932, Sec. 11323.)

TCA 2-2229. FAILURE TO DELIVER POLL BOOK.—If any judge, clerk or messenger after having been deputed by the judges of election to carry the poll books of such election to the place where by law they are to be canvassed, willfully or negligently fail to deliver safely such poll books within the time prescribed by law, with the seal unbroken, he is guilty of a misdemeanor. (Code 1858, Sec. 4908; Shan., Sec. 6855; mod. Code 1932, Sec. 11324.)

TCA 2-2248. CONSTRUCTION OF CHAPTER.—The provisions of this chapter are to be construed remedially, so as to effect the objects had in view. (Code 1858, Sec. 4911; Shan., Sec. 6858; mod. Code 1932, Sec. 11327.)

TCA 2-2249. TAMPERING WITH OR MUTILATION OF VOTING MACHINE—PENALTY.—No person shall tamper with or mutilate any voting machine owned or used by any county or municipality in the state of Tennessee, nor shall any person deface such machine by marking on the same with ink, paste, lipstick, fingernail polish, or any other substance, provided that nothing herein contained shall be construed so as to prohibit any election commissioner, officer, or any custodian from performing the duties [fol. 376] enjoined upon him by law in connection with any voting machine. Any person violating this section shall be

guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed five hundred dollars ($500) or imprisonment not to exceed six (6) months, or both fine and imprisonment in the discretion of the court. (Acts 1955, Ch. 269, Secs. 1, 2.)

[fol. 379] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

NOTICE OF CHARLES W. BAKER, ET AL., OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 29, 1960

I. Notice is hereby given that Charles W. Baker, David N. Harsh, Edmund Orgill, Roy Dixon, Herbert S. Esch, Jack W. Lee, Mrs. James M. Todd, W. D. Hudson, Guy L. Smith, and John R. McGauley, original plaintiffs, and Ben West, Mayor of the City of Nashville, individually and on behalf of the City of Nashville, the City of Knoxville, Tennessee, and the City of Chattanooga, Tennessee, intervening plaintiffs in the above styled cause, hereby appeal to the Supreme Court of the United States from the final order dismissing the original and intervening complaints entered in this action on the 4th day of February, 1960. [fol. 380] This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The complaint and amendment to original complaint filed by the original plaintiffs and the exhibits thereto.

(2) Proofs of service of process.

(3) The motions of the defendants to dismiss the complaint without the assemblage of a Three Judge District Court.

(4) The memorandum opinion of the Honorable William E. Miller overruling the motion to dismiss without assembling a Three Judge District Court.

(5) The notice given by District Judge William E. Miller to the Chief Judge of the Circuit Court for the Sixth Circuit, and the designation of the Three Judges constituting the Three Judge District Court hearing the plaintiffs.

(6) The intervening petition and the amended intervening petition of Ben West, Mayor of the City of Nashville, and the exhibits thereto.

[fol. 381] (7) The order entered allowing the intervention of Ben West, Mayor of the City of Nashville, as a plaintiff.

(8) The intervening petitions of the City of Knoxville and the City of Chattanooga, Tennessee, and any orders entered with respect thereto.

(9) The motion to dismiss the original and intervening petitioners' complaints.

(10) The per curiam opinion of the Three Judge District Court filed December 21, 1959, on the motion to dismiss.

(11) The order dismissing the original and intervening petitioners' complaints.

(12) The order of March 22, 1960, reflecting filing and consideration of the amended intervening petition of Ben West, Mayor, etc., and the admission of other intervening plaintiffs.

(13) This notice of appeal.

The foregoing designation of those items constituting a transcript of the record is intended to request the transmission to the Clerk of the Supreme Court of the United States

the entire record in this case, excluding the briefs and arguments of the parties.

III. The following questions are presented by this appeal:

[fol. 382] (1) Whether a State statute which in 1901 created an inequality of legislative representation and has been since retained by systematic and purposeful inaction through legislative refusal to obey the periodic reapportionment requirement of the State Constitution and the State constitutional guarantee of free and equal elections is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

(2) Whether the inequality of legislative representation created by this same State statute is also an abridgement of the right to vote guaranteed by Section 2 of the Fourteenth Amendment?

(3) Whether the systematic discriminatory allocation of tax burdens and tax benefits created by the inequality of State legislative representation under this State statute is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment?

(4) Whether a District Court of the United States is precluded by rulings of the United States Supreme Court from granting any form of relief where the District Court has found (a) that a State statute unequally apportions legislative representation in violation of a State Constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the State, (b) that in consequence the State Legislature is guilty of a clear violation of the State Constitution and of the rights of the plaintiff [fol. 383] voters under the Federal and State Constitutions, and (c) that the evil is a serious one which should be corrected without delay.

(5) Whether a Federal Court can, and is under obligation, to declare invalid a State statute which clearly denies equal voting rights to appellants when both the State Constitution and the Fourteenth Amendment clearly require equal voting rights?

(6) Whether in declaring such a State statute invalid, the Federal Court need inquire at this time into the ultimate political solution or whether the Court can assume such solution will be provided by the State?

(7) Whether implementation of the declaration of invalidity is a question which need be determined now, or whether the determination of this question may be held in abeyance until at some future time it may become necessary?

(8) Whether Federal Courts are under an obligation to protect federally guaranteed voting rights with appropriate relief, including, if necessary, injunction to restrain enforcement of an unconstitutional State statute when it is clear that there is no other means of obtaining relief.

(9) Whether the Civil Rights Act amendments of 1957 require the Federal Courts to grant relief where there is [fol. 384] a violation of equal voting rights?

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[fol. 385] Proof of Service (omitted in printing).

[fol. 386] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ORDER AUTHORIZING TRANSMITTAL OF ORIGINAL RECORD—
April 28, 1960

Notice of appeal having been filed in this cause, and it appearing that the record is voluminous and that it would be impracticable to copy same, it is ordered by the Court that the original record be transmitted by the Clerk of this Court to the Supreme Court.

Enter, this 28 day of April, 1960.

Wm. E. Miller, United States District Judge.

[fol. 387] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 389]

SUPREME COURT OF THE UNITED STATES

No. 103, October Term, 1960

CHARLES W. BAKER, et al., Appellants,

vs.

JOE C. CARR, et al.

ORDER NOTING PROBABLE JURISDICTION—November 21, 1960

Appeal from the United States District Court
for the Middle District of Tennessee.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdic-

November 21, 1960
tion is noted.

FILE COPY

No. 959

Office-Supreme Court, U.S.
FILED
MAY 21 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1961

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

This is an appeal by Charles W. Baker, *et al.* from an Order of February 4, 1960, entered in accordance with a *per curiam* Opinion of the District Court of the United States for the Middle District of Tennessee, as a three judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C. § 2281. This Statement is submitted by Appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Opinion of the District Court of the United States for the Middle District of Tennessee is reported at 179 F. Supp. 824 (M. D. Tenn. 1959) and is attached to this Jurisdictional Statement as Appendix A, *infra* at page 27. The Order of the District Court is attached to this Statement as Appendix B, *infra* at page 34. The Opinion of District Judge William E. Miller is attached to this Statement as Appendix J, *infra* at page 48.

JURISDICTION

This suit was brought under 28 U.S.C. § 1343 (3) and (4); 42 U.S.C. §§ 1983 and 1988; and 28 U.S.C. §§ 2201-2202, seeking a declaratory judgment as well as an interlocutory and permanent injunction restraining the enforcement, operation, and execution of an Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 through 3-107 (1956).

The Opinion of the District Court was rendered on December 21, 1959 and its Order was entered on February 4, 1960. Notice of Appeal was filed in the District Court on March 29, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *United States* v. *Cruikshank*, 92 U.S. 542; *Nixon* v. *Herndon*, 273 U. S. 536; *Smiley* v. *Holm*, 285 U.S. 355; *Colegrove* v. *Green*, 328 U.S. 549; *Turman* v. *Duckworth*, 329 U.S. 675; *Cook* v. *Fortson*, 329 U.S. 675; *Terry* v. *Adams*, 345 U.S. 461; *Cooper* v. *Aaron*, 358 U.S. 1.

STATUTES INVOLVED AND CONSTITUTIONAL PROVISION

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956), which is set forth in Appendix C, *infra* at page 35. 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1983 and 1988 which are set forth in Appendix N, *infra* at page 59. The UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2, which is set forth in Appendix C, *infra* at page 37.

QUESTIONS PRESENTED

1. Whether a state statute which, in 1901, created an inequality of legislative representation and has been since retained by systematic and purposeful inaction through legislative refusal to obey the periodic reapportionment requirement of the State Constitution and the State constitutional guarantee of free and equal elections, is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution?

2. Whether the inequality of legislative representation created by this same State statute is also an abridgement of the right to vote guaranteed by Section 2 of the Fourteenth Amendment?

3. Whether the systematic discriminatory allocation of tax burdens and tax benefits created by the inequality of State legislative representation under this State statute is a denial of the equal protection of the laws and the due process of law guaranteed by the Fourteenth Amendment?

4. Whether a District Court of the United States is precluded by rulings of the United States Supreme Court from granting any form of relief where the District Court has found (a) that a State statute un-

equally apportions legislative representation in violation of a State Constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the State, (b) that in consequence the State Legislature is guilty of a clear violation of the State Constitution and of the rights of the plaintiff voters under the Federal and State Constitutions, and (c) that the evil is a serious one which should be corrected without delay?

5. Whether a Federal Court can, and is under obligation, to declare invalid a State statute which clearly denies equal voting rights to Appellants when both the State Constitution and the Fourteenth Amendment clearly require equal voting rights?

6. Whether in declaring such a State statute invalid, the Federal Court need inquire at this time into the ultimate political solution or whether the Court can assume such solution will be provided by the State?

7. Whether implementation of the declaration of invalidity is a question which need be determined now, or whether the determination of this question may be held in abeyance?

8. Whether Federal Courts are under an obligation to protect federally guaranteed voting rights with appropriate relief, including, if necessary, injunction to restrain enforcement of an unconstitutional State statute when it is clear that there is no other means of obtaining relief.

9. Whether the Civil Rights Act amendments of 1957 and particularly 28 U.S.C. 1343 (4) require the Federal Courts to grant relief where there is a violation of equal voting rights?

STATEMENT OF THE CASE

This action was brought by Appellants, qualified voters and taxpayers in the State of Tennessee, against

election officials under the Civil Rights Acts,[1] to invalidate a statute which denies the equal voting rights guaranteed to them by the Constitution of Tennessee[2] and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The Tennessee Constitution requires an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties or districts according to the number of qualified voters.[3] The last Act reapportioning the number of legislators was passed in 1901.[4] This Act was violative of the state and Federal Constitutions at that time because an enumeration of qualified voters was not made and the actual number of qualified voters in the state was ignored. Furthermore, after 1911, the Act of 1901 was no longer a constitutional basis for the election of representatives and senators because a new enumeration of qualified voters as well as a new apportionment of representation in the General Assembly was required in 1911 and every ten years thereafter.[5] Each and every Tennessee legislature since 1901, including the legislature in office at the time the Complaint in this case was filed, has failed to reapportion the number of legislators required to be elected from the several counties and districts of the state. Systematically and purposefully, the General Assemblies elected since 1901 have

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[1] 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1952); 16 Stat. 144 (1870) as amended, 42 U.S.C. § 1988 (1952); 62 Stat. 932 (1944) as amended, 28 U.S.C. § 1343 (3) and (4) (1957).

[2] TENN. CONST., art. I, § 5 (1870).

[3] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

[4] Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101—3-107 (1956).

[5] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

defeated all bills proposing reapportionment of the legislature.[6]

The Appellants have on the average one-tenth (1/10) of a vote and here seek a full vote in choosing members of the state legislature. Other citizens of Tennessee have a full vote while still other members of a selected minority in the state have the equivalent of ten times the vote allowed the Appellants. The right to a full rather than a fractional vote is both recognized and guaranteed by the Fourteenth Amendment of the Federal Constitution and the Tennessee Constitution.[7] Significant state population changes since 1901 and the failure and refusal of the various Tennessee legislatures to reapportion themselves since that date have caused discrimination against the Appellants because their votes are nowhere near as effective as those of voters residing in other state counties and electoral districts. The geographical areas in which Appellants reside are experiencing an explosion in population growth, and the disenfranchisement will be intensified with the passage of time.

The record proves that the Act of 1901 violates the Tennessee and Federal Constitutions and has had the effect of conferring control of the State General Assembly upon a selected minority of the Tennessee voting population. A purposeful and systematic plan to discriminate against a geographical class of persons in their voting rights now exists in Tennessee by the continued enforcement of the statute here challenged.

The statute in issue has caused a denial of both equal protection of the laws and due process of law to Appel-

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[6] Exhibit I, Intervening Petition of Ben West, Mayor, entitled Historical Study, etc.

[7] Tenn. Const., art. I, § 5 (1870).

lants through the discriminatory allocation of tax burdens and the unequal and unjust distribution of funds derived from that taxation. State legislation is passed for the support of public schools, for the maintenance of roads, and highways, and for other purposes. The money collected as a result of such legislation is distributed by an unconstitutionally apportioned legislature through arbitrary, unreasonable and discriminatory formulas[8] to Tennessee county and municipal governments in proportion to their under or over representation in the General Assembly. For example, a voter in Moore County (with a population of 2340) has 23 times as much representation in the lower House as does a voter in Shelby County (with a population of 312,345), and Moore County receives 17 times the apportionment per vehicle of state gasoline and motor fuel taxes as does Shelby County. See Appendices F, G and H, *infra* at pages 41, 43, 45.

These discriminatory apportionment formulas directly affect the share in Federal tax moneys accruing to the several counties in which Appellants' reside because Federal grants-in-aid to the state for highway construction and other Federal purposes are made on a "fund matching basis." See Appendix I, *infra* at page 47.

Similar discriminatory practices exist in the allocation of sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes and other taxes. This situation in Tennessee is clearly a case of taxation without fair representation since it requires the unfavored many to pay higher taxes then the favored few.

A remedy which would contemplate direct action against the state legislature or its members requiring

[8] See Appendices D and E, *infra* at pages 39, 40.

them to reapportion membership in the legislature among the counties and districts has not been sought in this case. The District Court was asked to do three things: (1) to declare unconstitutional and to enjoin enforcement of the Act of Apportionment of 1901 and those provisions of the Tennessee Code which have further exaggerated its original inequalities, (2) to order an election at large without regard to the counties or districts, and (3) in the alternative, to direct the Appellees to hold an election in accordance with the formula for legislative representation provided in the State Constitution using the 1950 or subsequent federal census to determine the number of qualified state voters.

The District Court found that the issues presented in this case were "of such a character that they should be evaluated by a three-judge court." In referring the matter to the statutory court, District Judge Miller's Opinion of July 31, 1959, cited the difference between the case of *Colegrove* v. *Green,* 328 U.S. 549, and the case at bar. He pointed out that while there had been no violation of the Illinois constitution or any provision of federal law in the *Colegrove* case, *supra,* relief for inequitable legislative districting could have been obtained there from the United States Congress. Judge Miller said that absent judicial action there is no remedy at all in the Tennessee situation. His decision is set forth in Appendix J, *infra* at page 48.

A motion to dismiss was filed by the Appellees upon the grounds that the statutory Court did not have jurisdiction of the subject matter of the suit, that there had been a failure to state a claim upon which relief could be granted, and that certain alleged indispensable parties had not been joined. The case was heard by a three-judge Court on November 23, 1959.

The three-judge Court on December 21, 1959 in a *per curiam* Opinion, denied the relief prayed for by Appellants, stating:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay." Appendix A, *infra* at page 27.

On February 4, 1960, an Order dismissing the Complaint in this case was entered by the District Court on the grounds that the court lacked jurisdiction of the subject matter and that the Complaint failed to state a claim upon which relief could be granted. This appeal is from that final Order, pursuant to 28 U.S.C. § 1253.

THE QUESTIONS ARE SUBSTANTIAL

The instant appeal presents on the record herein one of the clearest denials of constitutional rights yet brought before this Court. The right to vote is the cornerstone of civil rights. The discrimination suffered by the Appellants is shocking to the conscience and violative of the guarantees of the Fourteenth Amendment to the Federal Constitution.

Because of its unique facts, this is a case of first impression. The validity of a state statute which grossly dilutes the right of a citizen to an equal vote and equal representation in the face of state constitutional commands requiring equal elections and equal representation (and thereby abridges rights under the Fourteenth Amendment) has never before been passed upon by this Court. The Act attacked in effect

prohibits equality of representation and prescribes the election of a majority of the legislature by a minority of the people of Tennessee. It thus repeals the commands of the State constitution.

The record in this appeal makes it unmistakeably clear that all avenues for relief (other than this Court) are closed to the Appellants because of the unique circumstances which exist in Tennessee. All remedies through state legislative, executive, and judicial avenues are closed to Appellants. The record proves this beyond dispute. Unless this Court acts to end a flagrant instance of State interference with Federal rights, there will never be a restoration of full voting rights for Appellants and all others similarly situated nor will there be a termination of its related circumstances.

The Court is here urged to correct one of the most vicious malignancies in American government.* The issues involved directly affect millions of American citizens who are now deprived of rights guaranteed by our Federal Constitution.

This case therefore presents not only the inequalities in Tennessee legislative representation, but the inequalities in legislative representation throughout the United States. It pleads for judicial aid as the means of preserving a liberty basic to a democratic form of government, that is, the right to vote and have one's vote counted equally with that of other voters.

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* Fleming, *America's Rotten Borough*, Nation Magazine, January 10, 1959, Vol. 188, p. 26.

Kennedy, *The Shame of the States*, N. Y. Times, May 18, 1958, § 6 (Magazine) p. 12.

Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L Rev. 1057 (1958).

Strout, *The Next Election is Already Rigged*, Harper's Magazine, November 1959, Vol. 219, p. 25.

This Court on March 22, 1960 granted certiorari in the case of *Gomillion* v. *Lightfoot*, 270 F. 2d 594 (5th Cir., 1959) which is concerned with a state legislative alteration of a municipality's boundaries to impair the voting rights of a group of Negroes. There is no substantive difference between the deprivation of the right to vote in Tuskegee municipal elections and the refusal to count at full value votes cast by hundreds of thousands of Negroes and whites in certain Tennessee counties and districts at a state election. Minority decisions in both *Colegrove* v. *Green*, 328 U.S. 549, and *South* v. *Peters*, 339 U.S. 276, found no basis for distinguishing the latter cases from other cases involving the rights of Negroes.

Judicial failure to act under the circumstances of this case cannot be justified by any precedent of law or equity. As stated in the Opinion of Judge William E. Miller, Appendix J, *infra* at page 48.

> "In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.
>
> * * * * * * *
>
> "If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate

the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen."

I

THE TENNESSEE STATUTE IS UNCONSTITUTIONAL BECAUSE, CONTRARY TO LAW, IT REQUIRES UNEQUAL LEGISLATIVE REPRESENTATION AND CAUSES CROSS DISCRIMINATION IN STATE VOTING RIGHTS.

A. The Tennessee Voting Right is Diluted By Fractional Representation In Direct Violation of the Fourteenth Amendment.

Unquestionably, the failure of the Tennessee legislature since 1901 to take the action required of it has resulted in the giving of a full vote or better to a minority of state voters and a fraction of a vote to a majority of state voters. This action has caused a denial of the equal protection of the laws to the Appellants as much so as if discrimination had occurred because of race, color, or creed. As plainly stated by a minority of this Court in *South* v. *Peters*, 339 U.S. 276:

> "It is said that the dilution of plaintiff's votes . . . is justified . . . If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon*, which have insisted that where there is voting there be equality . . . (T)here shall be no inequality in voting power by reason of race, creed, color, or other invidious discrimination." 339 U.S. at 281.

Geographical discrimination and racial discrimination are equally onerous. Although the Federal constitution does not give rise to the individual citizen's right

to vote, since this franchise springs from the individual states themselves, *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162; *McPherson* v. *Blacker*, 146 U.S. 1, nonetheless, where state law grants such a right, each citizen must be equally protected in the operation of that law. *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Cruikshank*, 92 U.S. 542. The Tennessee Constitution grants the full right of suffrage to Appellants. There can be no dilution by the state of that right to vote through the medium of fractional representation for certain voters and full representation for other voters. *United States* v. *Mosley*, 238 U.S. 383; *Nixon* v. *Herndon*, 273 U.S. 536; *United States* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649; *United States* v. *Saylor*, 322 U.S. 385; *Terry* v. *Adams*, 345 U.S. 461.

Otherwise, and this is now the case in Tennessee, an elective franchise to all intents and purposes is lost. An unequal voice in elections and a complete denial of participation in an election are of the same offensive order. Because of great changes in the population of Tennessee Counties as indicated in Appendix K, *infra* at page 54, the existing legislative apportionment has become progressively discriminatory in character.

The Tennessee Constitution requires a specific reapportionment every ten years. Various legislatures, including the one presently in session, have adamantly refused to pass a valid apportionment statute for these sixty-odd years. Because of this complete disregard for the commands of the Tennessee Constitution, Shelby County now lacks seven Representatives and two Senators; Davidson County now lacks three Representatives and a Senator; and Knox County and Hamilton County now lack three Representatives and a Senator to which each of these counties is constitutionally entitled.

As shown by Appendix F, *infra* at page 41, population changes and certain amendments to the Act of 1901 by the year 1950, as reflected by the Census of the United States population taken in 1950, found twenty-three Tennessee counties possessed of twenty-five direct representatives when their voting population entitled them to only two direct representatives. As of the year 1950, ten Tennessee counties, as shown in Appendix F, *infra* at page 41, although entitled to forty-five direct representatives under the State Constitutional formula, actually had only twenty direct representatives. Similar disparity in the voting population of the Senatorial districts is indicated in Appendix L, *infra* at page 55, as reflected by the 1950 census. The over-represented counties, on a *per capita* basis, are allowed a 500% participation in state shared funds, as compared to under-represented counties. See Appendix M, *infra* at page 57.

The overall result of this discrimination is that 37% of the qualified voters in Tennessee elect twenty of the thirty-three members of the State Senate, and 63% elect but thirteen members of the Senate. In the Tennessee House of Representatives, 40% of the voters elect sixty-three of the ninety-nine members of the House, while 60% of the voters elect only thirty-six members of the House. No Bill seeking to reapportion since 1901 has received more than 13 votes in the State Senate nor more than 36 votes in the House.

B. The Validity of A State Statute Violating State Constitutional Guarantees of Equal Voting Rights And Abridging Federal Constitutional Rights Presents A Question Which Has Not Been Determined By This Court.

A state statute which dilutes the right of a citizen to an equal vote in the face of state constitutional com-

mands requiring equal representation and free and equal elections, and which thereby abridges rights under the Fourteenth Amendment, has never before been passed upon by this Court.

The case at bar is distinguishable from *Colegrove* v. *Green, supra.* Whereas the plaintiffs there contended that the Illinois congressional apportionment law deprived them of constitutional rights to equal representation, the Court found that the act [10] governing redistricting for Federal representation contained no requirements as to compactness, contiguity or equality in the population of Congressional districts. In neither the *Colegrove* case nor its predecessor, *Wood* v. *Broom,* 287 U.S. 1, was there a declared policy of representation or equal voting rights, in organic or statutory law. Tennessee's 1901 Apportionment Act violates a specific constitutional command couched in language depriving the legislature of any "political" discretion to deviate from the command.

McDougal v. *Green,* 335 U.S. 281, was only concerned with a claim which had been made by a political party that an Illinois statute denied rights under the Fourteenth Amendment. The statute required that a petition to form and nominate candidates for a new political party be signed by a representative group of qualified voters encompassing at least 50 of the state counties.

In *South* v. *Peters, supra,* this Court held that the lower court had properly dismissed a suit to set aside the Georgia county unit vote in connection with a primary election involving United States Senators. The lower Federal Court had decided that under the Georgia

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[10] 46 Stat. 26 (1929) (later amended by 54 Stat. 162 (1941), 2 U.S.C. § 2a (1959).

Constitution there was no guarantee of a substantially equal vote in such an election. Clearly the *South* case could not have presented or decided the constitutional issue in the case at bar.

Thus, in the leading cases on voting rights as well as in other similar cases before this Court both prior and subsequent to *South* v. *Peters, supra,* the issue of the constitutionality of a reapportionment act under the circumstances now existing in Tennessee has remained undecided.[11] This Court has not yet reached that constitutional question.

In the case at bar, the 1901 Act of Apportionment, applies to rural, sparsely settled counties and to populous counties a numerical formula which completely ignores the state constitutional requirement of representation based upon population. The result is an abridgement of the right to vote for members of the state legislature, and a denial of the equal protection of the laws, under the Fourteenth Amendment. A large-scale dilution of political rights has occurred in Tennessee through an obviously discriminatory practice. It is of the greatest importance that this Court now lend its support to terminate injustices which if permitted would continue indefinitely in Tennessee.

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[11] *Hartsfield* v. *Sloan,* 357 U.S. 96.
Kidd v. McCanless, 352 U. S. 920.
Radford v. *Gary,* 352 U. S. 991.
Anderson v. *Jordan,* 343 U.S. 912.
Cox v. *Peters,* 342 U.S. 936.
Remmey v. *Smith,* 342 U.S. 916.
Colegrove v. *Barrett,* 330 U.S. 804.
Cook v. *Fortson,* 329 U.S. 675.
Turman v. *Duckworth,* 329 U.S. 675.
Wood v. *Broom,* 287 U.S. 1.

II

RESTORATION OF A FULL VOTING RIGHT AND AN END TO DISCRIMINATION CAN ONLY BE ACHIEVED WITH ASSISTANCE OF THIS COURT BECAUSE APPELLANTS HAVE EXHAUSTED ALL AVENUES OF RELIEF.

Appellants present here a case and controversy where a federally guaranteed right has been violated and where it is obvious under the circumstances that no relief can ever be obtained unless this Court intervenes.

A. The Tennessee Legislature has Refused to Act.

Historical data in the record shows that for over half a century the Tennessee General Assembly has refused to rectify its unlawful composition to afford Appellants and other persons similarly situated their lawful voting rights. It is no longer reasonable to expect that those who benefit, and who control the state legislature, by reason of an unlawful apportionment will of their own volition relinquish the advantage or terminate the control.

B. The Highest Court of the State Has Refused to Act.

In *Kidd* v. *McCanless,* 200 Tenn. 282, 292 S.W. 2d 40 (1956), *appeal dismissed* 352 U.S. 920, the Tennessee Supreme Court failed to hold that the 1901 Act of Apportionment was unconstitutional and denied declaratory and injunctive relief.[12] The Tennessee Constitution does not provide for initiative or referendum action by state citizens to correct the abuse which has

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[12] This decision nullified the remedy proposed to be given by the Chancery Court of Tennessee.

been sustained by Appellants. A state Constitutional Convention is not an available remedy to correct the injustice now being perpetuated because such a Convention could only be called by a majority vote of two successive General Assemblies,[12] and that vote could never be obtained from the legislature as it is now constituted. All such proposals have for sixty years been rejected. Even if such a Convention were held, its delegates would be chosen in an unrepresentative manner reflecting the present legislative apportionment. The governor has no authority to assemble a constitutional convention.

Tennessee voters such as the Appellants are *in extremis*. The utter lack of remery makes the Appellants' cause unique. In *Colegrove* v. *Green, supra,* the Court expressed the view that recourse to the Congress of the United States was possible to correct the inequities in a congressional reapportionment act. The same remedy was also available in *Wood* v. *Broom, supra,* which was relied upon in the *Colegrove* case. In Oklahoma, as evidenced by *Radford* v. *Gary,* 145 F. Supp. 541 (W. D. Okla. 1956), *affirmed without opinion,* 352 U.S. 991, the state constitution contains initiative and referendum provisions. In *Remmey* v. *Smith,* 102 F. Supp. 708 (E. D. Penn. 1951) *appeal dismissed for want of a substantial federal question,* 342 U.S. 916, a remedy was said to be available in the state courts of Pennsylvania. A local judicial remedy was also available in *Perry* v. *Folsom,* 144 F. Supp. 874 (N. D. Ala. 1956).

A refusal by this Court to act in the Tennessee situation will permit the continuation of a shocking violation of Federal Constitutional guarantees, as well as

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[12] Tenn. Const., art. XI, § 3 (1870).

a degeneration of the very principles upon which representative government in the United States is grounded.

III

THIS COURT HAS JURISDICTION OVER A CASE INVOLVING THE DENIAL OF STATE VOTING RIGHTS BY STATE ACTION UNDER COLOR OF LAW.

This Court's reluctance to grant equitable relief in *South* v. *Peters*, 339 U.S. 276, must not be construed as being based upon a lack of jurisdiction over the subject matter of state voting rights or upon the constitutional doctrine of separation of powers.[14] This Court has in many instances assumed jurisdiction where political rights, such as the right to vote, were in issue.

This was clearly true in *Colegrove* v. *Green, supra*, where a majority of the justices believed that *Smiley* v. *Holm*, 285 U.S. 355, had decisively determined the right to seek judicial review of a state act regarding legislative representation where it was questioned whether state constitutional requirements essential to the validity of the act had been met.

The holding in *Colegrove* v. *Green, supra*, was aptly summarized by Mr. Justice Rutledge in *Turman* v. *Duckworth*, 329 U.S. 675, as follows:

> "A majority of the Justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."
> 329 U.S. at 678

[14] This Court held that Federal Courts consistently refuse *to exercise* the equity powers of which they are possessed in cases pertaining to a state's geographical distribution of electoral strength among its political subdivisions.

The point that cases involving the right to vote are justiciable is clearly shown in *MaDougal* v. *Green, supra,* where there was unqualified assumption of jurisdiction, and in *South* v. *Peters, supra,* where a simple majority of this Court refused to exercise its equity powers, but did not disclaim the case on purely jurisdictional grounds.

While there may be some confusion in lower court cases attempting to distinguish between jurisdiction and remedy in situations involving state voting rights, the foregoing cases concerned with fractional representation buttressed by substantial authority in the area of voting discrimination should dispose of any contention that the case at bar is outside the jurisdiction of this Court.[15]

IV

THIS COURT SHOULD EXERCISE ITS EQUITY JURISDICTION UNDER THE SPECIAL CIRCUMSTANCES OF THIS CASE—A BASIS FOR SUCH ACTION IS PROVIDED BY CASE PRECEDENT AND THE CIVIL RIGHTS ACTS.

There are several cases such as *Smiley* v. *Holm, supra,* and *Rice* v. *Elmore,* 165 F. 2d 387 (4th Cir. 1947) *cert. denied* 333 U.S. 875, were declaratory and injunctive relief has been exercised to protect the right of American citizens to vote. As stated in *Snowden* v. *Hughes,* 321 U.S. 1, the right to relief under the Fourteenth Amendment is not diminished by the fact that the discrimination in question relates to political rights.[16] As this Court stated in the case of *Cooper* v. *Aaron,* 358 U.S. 1:

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[15] *Nixon* v. *Herndon,* 273 U.S. 536; *Terry* v. *Adams,* 345 U. S. 461.

[16] See also *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; and *Smith* v. *Allwright,* 321 U.S. 649, where this Court has exercised jurisdiction over suits at law for damages arising from a deprivation of the federally protected right of suffrage.

> ". . . The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a States government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." 358 U.S. at 16-17.

The question before this Court is whether or not a declaratory judgment and injunctive relief be granted where state voting rights have been abridged under color of law in violation of the Fourteenth Amendment in a particular set of circumstances never before considered by this Court. Whereas other voting rights cases have contained only an argument (albeit a good argument) that there was unfairness in legislative representation, the Tennessee Constitution in the case at bar *requires* fair representation pursuant to free and equal elections. Whereas other voting rights cases have contained some ostensible avenue of alternative redress, the case at hand is completely devoid of such possibilities.

28 U.S.C. § 2201 provides for a declaration of the rights of interested parties where a case presents justiciable issues.[17] It is submitted that such issues exist in the case at bar.

The specific means of enforcing the Appellants right in equity is granted by 42 U.S.C. § 1983, *supra,* in conjunction with 28 U.S.C. § 1343(4) *supra,* both printed in Appendix N, *infra,* at page 59. In Part III

[17] *Altvater* v. *Freeman,* 319 U.S. 359

of the Civil Rights Act of 1957, specifically, 28 U.S.C. 1343(4), Congress has unequivocally provided for equitable relief in cases involving the right to vote. The language of this provision is quite clear. It states that the district courts shall have original jurisdiction of any civil action:

> "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" [emphasis added]

The coordinate effect of these several statutes is to provide ample procedural and substantive authority for this Court to exercise declarative and equitable jurisdiction and thereby restore to Appellants their right to vote bestowed by the Tennessee Constitution and guaranteed by the Fourteenth Amendment.[18]

With the added impetus of 28 U.S.C. § 1343(4), Federal Courts are no longer justified in refusing to exercise equity jurisdiction as in *Giles* v. *Harris,* 189 U.S. 475, and in *South* v. *Peters, supra.*

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[18] In the recent racial segregation case, *Willie* v. *Harris County, Texas,* 180 F. Supp. 560 (S.D. Tex. 1960), plaintiff sought an action for declaratory judgment and permanent injunction to restrain county authorities, and relied upon 28 U.S.C. §§ 1331 and 1343 in conjunction with 42 U.S.C. §§ 1981 and 1983. The court found that the action was brought prematurely but did not dismiss the case for want of jurisdiction. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

V

VOTING INEQUALITY IN TENNESSEE CAN BE TERMINATED WITHOUT DIFFICULTY THROUGH INITIAL USE OF ONE OF SEVERAL PRELIMINARY ALTERNATIVE STEPS.

We are confident that this Court will have no difficulty in accepting the finding of the three-judge District Court below that Appellants' constitutional rights have been violated, and that the only problem is achieving the corrective action. In this connection we are mindful that *Colegrove* v. *Green, supra,* and *McDougal* v. *Green, supra,* indicate the concern of this Court for practical considerations when relief is sought in cases involving voting rights. In actuality, it is very likely that voting inequality in Tennessee could be terminated without encountering the difficulties anticipated in these cases. This has been shown to be true in Minnesota where citizens obtained a declaration from a three judge District Court in *McGraw* v. *Donovan,* 163 F. Supp. 184 (D. Minn. 1958) after which the state legislature promptly assembled and reapportioned its seats. Similarly, citizens of Hawaii found the United States Congress respectful of a declaration by a District Court in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

A step-by-step approach by this Court utilizing certain alternative forms of relief is both feasible and important in the case at bar. It is almost certain that a declaratory judgment, by this Court or by the District Court, which invalidated the Tennessee Reapportionment Act of 1901 would prompt the state legislature to pass the required electoral redistricting Act.[19] Faced

[19] Jurisdiction would be retained by the Court until suitable action was taken.

with such a declaration, it is apparent that the Tennessee legislature would not assume the risk of functioning as it has in the past because by doing so it would jeopardize the future validity of its numerous fiscal, economic, social, and political programs.

It is possible that this Court may be reluctant to issue a declaratory judgment because of the Tennessee Supreme Court decision in *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d. 40 (1956). In our view the Court would not be bound to accept the finding in the *Kidd* case, *supra*, that an invalidation of the 1901 Act of Apportionment would prevent the state legislature from functioning in a *de facto* capacity to provide for a new reapportionment.[20] Furthermore Tennessee's Supreme Court, in part, placed its refusal to act on the failure of the complainants to point to a prior valid Act of Apportionment.[21]

If the Court is inclined to follow, or at the initial stage not dispute, the reasoning of *Kidd* v. *McCanless*, *supra*, there are two other forms of preliminary relief which it could grant. The Court could enjoin state election officials from holding any future election under the Act of 1901.[22] As in the case of declaratory judgment, this form of injunctive relief is almost certain to evoke corrective action by the Tennessee legislature

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[20] *Hanover Fire Insurance Co.*, v. *Carr.*, 272 U.S. 494, 509.

[21] This reasoning implies that the existence of a state legislature depends upon some act of apportionment validly enacted by it in spite of TENN. CONST., art II, § 9 which declares that the legislature "shall be dependent upon the people".

[22] This form of relief is not similar to that sought in *Perry* v. *Folsom*, 144 F. Supp. 874 (W.D. Ala. 1956), or *Remmey* v. *Smith*, 102 F. Supp. 708 (E.D. Penn). In those cases, affirmative remedies were sought against the legislature and executive branches themselves to force and require the passage of reapportionment statutes.

without there being encountered the legal difficulty envisioned in the *Kidd* case, *supra,* regarding the effects of a declaratory judgment.

As another alternative preliminary step the Court could affirm the District Court's finding that a violation of the Appellants' rights had occurred, and announce its intention to consider at a future date, if necessary, the question of relief. The Court would not initially decide whether declaratory or injunctive relief should be granted. The interval of time permitted by the Court would be sufficient to permit the General Assembly of Tennessee the opportunity to reconsider and act upon a lawful reapportionment.

The latter alternative is a course of action preferred by the Appellants because it may eliminate entirely any necessity for considering the grant of future judicial relief. However, if the need for such relief is not eliminated, this Court would then hear counsel for the parties to determine with specificity the form of equitable or declaratory relief. Whether the result would entail a directive to state election officials (by this Court or by the District Court) for an election at large, or for a revision, in accordance with the 1950 census of the numbers of legislators to be elected from each county and district or other form of remedy, could properly be considered at that time.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal from a judgment denying a state voting right granted by the Tennessee Constitution and guaranteed by the United States Constitution.

Respectfully submitted,

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APPENDIX A

Received for entry 9:25 A.M. December 21, 1959.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES BAKER ET AL., PLAINTIFFS,

v.

JOE C. CARR ET AL., DEFENDANTS

Before: MARTIN, Circuit Judge, and BOYD and MILLER, District Judges

PER CURIAM. The original plaintiffs and intervening plaintiffs citizens and qualified voters residing in different areas of Tennessee, seek to challenge in this action under the equal protection and due process clauses of the Fourteenth Amendment the existing legislative apportionment in Tennessee. Briefly summarized, the contentions of the plaintiffs [1] are as follows:

The Constitution of Tennessee (Article 2, Sections 4, 5 and 6) directs the legislature at the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the members of the legislature among the several counties or districts according to the number of qualified voters therein. It provides for 99 members of the House of Representatives and 33 members of the Senate. Despite the mandatory requirements of the state constitution, no reapportionment has been enacted by the legislature since the Act of 1901, and even that Act was passed without the enumeration of voters required by the Constitution of the State. Although persistent demands

[1] In this opinion the term "plaintiffs" will include both the original plaintiffs and the intervening plaintiffs. After the original complaint was filed other parties were allowed to intervene as plamtiffs, including the Mayor of the City of Nashville.

have been made upon the legislature to reapportion the state for Legislative purposes in accordance with the constitutional command, and although numerous bills have been introduced in the legislature to accomplish this purpose, the distribution of legislative seats remains as provided for in the Act of 1901. Such legislative distribution is grossly disproportionate to the distribution of population in the state, a condition brought about by shifts or changes in population since 1901. The inevitable result of this violation of the constitutional mandate is a gross inequality of legislative representation, a debasement of the voting rights of large numbers of citizens, and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. Illustrating the inequality, it is pointed out that a minority of approximately 37 per cent of the voting population of the state now controls 20 of the 33 members of the Senate. It is further alleged that such inequality of representation has resulted in continuous and systematic legislative discrimination against the plaintiffs and others similarly situated with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power, notably funds for the support of the public schools, the maintenance of roads and highways and other purposes.

Named as defendants in the action are the Secretary of State, the Attorney General, the Co-Ordinator of Elections, and the Members of the State Board of Elections. No remedy is sought by the plaintiffs which would contemplate direct action against the state legislature or its members to require them to reapportion the legislative districts. Specifically, the plaintiffs request that the Court declare unconstitutional the legislative Reapportionment Act of 1901 as well as the Code provisions of Tennessee implementing that Act as being violative of the equal protection and due process clauses of the Fourteenth Amendment, and that the Court then either (a) require by injunction that the defendants take necessary steps to hold an election by means of which the members of the next legislature would be elected from the state at large without regard to counties or districts, or (b) direct the defendants to hold an election by means of which the members of the legislature would be elected from counties and districts in accordance with the constitutional formula by applying mathematically the federal census of 1950.

The action is presently before the Court upon the de-

fendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court.

The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. Colegrove v. Green, 328 U. S. 549; Cook v. Fortson and Turman et al. v. Duckworth, 329 U. S. 675; Colegrove v. Barrett, 330 U. S. 804; McDougal et al. v. Green, 335 U. S. 281, South et al. v. Peters, 339 U. S. 276 Remmey v. Smith, 342 U. S. 916; Anderson v. Jordan, 343 U. S. 912; Kidd v. McCanless et al. 352 U. S. 920; Radford v. Gary, 352 U. S. 991.

In view of this array of decisions by our highest court, charting the unmistakable course which this Court must pursue in the instant case, it is unnecessary to consider decisions by lower federal courts. It is significant to point out that the case of Kidd v. McCanless, supra, involved the identical apportionment statutes and the identical state of facts with respect to apportionment of representatives in Tennessee, as the present action, the appeal in that case by the plaintiffs from the adverse decision of the Supreme Court of Tennessee being dismissed by the Supreme Court of the United States upon the authority of Colegrove v. Green, supra, and Anderson v. Jordan, supra. Moreover, the facts in the recent case of Radford v. Gary, supra, decided February 25, 1957, are substantially parallel to the facts of the present case. The plaintiffs attacked the existing legislative apportionment in Oklahoma, alleging inequalities in legislative representation and a consequent violation of the equal protection clause of the Fourteenth Amendment. The relief sought was not only a mandatory injunction against the members of the legislature, but in the alternative that the members of the legislature be elected at large until constitutional reapportionment could be effected. A Three-judge federal district court dismissed the action (Radford v. Gary, 145 F. Supp. 541) and the Supreme Court of the United States affirmed the judgment of the district

court by a per curiam opinion upon the authority of Colegrove v. Green, supra, and Kidd v. McCanless, supra. The Court can find no way in the present case to escape the compelling authority of this ruling as well as the other rulings of the Supreme Court herein cited.[2]

The wisdom and soundness of the non-intervention rule consistently followed by the Supreme Court is strikingly pointed up when the question of an appropriate judicial remedy is considered. As stated, the plaintiffs do not even insist that the Court could or should take any direct action against the legislature itself, by mandamus or otherwise, to compel the individual members of the legislature to perform their constitutional duties to reapportion the state legislative seats. The suggested remedies are indirect in character. Kidd v. McCanless, 200 Tenn. 273, affirmed by the Supreme Court of the United States in Kidd v. McCanless, supra, holds that a declaration of unconstitutionality of the existing apportionment statute of Tennessee, without more, would result in a destruction of the state government itself, since the de facto doctrine would not be applicable to maintain the present members of the legislature in office and there would be no prior valid apportionment act to fall back upon. In view of this decision, the plaintiffs recognize that the Court, if it declared the existing apportionment statute unconstitutional, would be required to go further and devise an appropriate remedy so as to avoid a disruption of state government. However, the remedies suggested by the plaintiffs are neither feasible nor legally possible.

The alternative of an election at large is met with a number of insuperable objections. First, the Constitution of Tennessee specifically provides for the election of members of the legislature from counties and districts, and no provision whatever is made for a legislature composed of members elected at large.[3] It is true that the Constitution pro-

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[2] The duty of the court to refuse intervention is not changed by allegations to the effect that various tax proceeds are allocated upon a discriminatory basis. Even if such general allegations could be accepted as showing specific results of existing legislative apportionment, they do not change the essential character of the controversy or the fundamental bases of the Supreme Court ruling refusing intervention.

[3] Smiley v. Holm, 285 U.S. 355, and Koenig v. Flynn, 285 U.S. 375, relied on by plaintiffs for ordering an election at large both

vides that the legislature of the state is "dependent upon the people" but the power to direct an election at large cannot be inferred from such general language in the face of specific provisions for election from districts. Practical considerations also are heavily weighed against such a remedy. It would lead to serious geographical inequalities and other discriminations, probably to a greater extent than those presently existing. It would require the Court not only to provide for the supervision of the entire election but also to devise detailed rules and regulations under which such election should be held, a task which the courts are not equipped to undertake. Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate. An election at large, directed by the Court, would indeed inject the Court into a "political thicket," as stated in Colegrove v. Green, supra.

Equally objectionable would be an election held on the basis of an enumeration of voters in the various counties and districts of the state determined by the Court by applying the last federal census. The Constitution of the state vests the duty of making the enumeration in the legislature and not in the courts. Moreover, the redistricting of the state is required to be based upon an enumeration of the qualified voters and not upon population alone. The Court would have no way of knowing the number of qualified voters in the various districts. Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state.

It is strenuously argued by the plaintiffs that the case alleged in the complaint is one involving a clear violation of their individual rights guaranteed by the Fourteenth Amendment, and for this reason that the Court should in some way overcome its reluctance to intervene in matters of a local political nature and formulate a remedy which would adequately protect their rights. It is insisted that the wrong committed against them by the failure and refusal of the state legislature to abide by the state constitution is clear

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dealt with the election of congressional representatives under a federal act providing for the election of representatives at large under certain conditions, and these cases are not in point here.

and unmistakable and that the courts should not leave such wrong without a remedy. With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. Some examples of such rights not appropriate for judicial relief were set forth by Mr. Justice Frankfurter in his opinion in Colegrove v. Green, supra.

> "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' Art. IV, Sec. 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But fulfillment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson* 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." (p. 556)

Being of the opinion that the Court has no right to intervene or to grant the relief prayed for, it is unnecessary to discuss the further ground of the motion that the action must fail because of the nonjoinder of indispensable parties as defendants.

An order will be submitted dismissing the action in accordance with this opinion.

/s/ JOHN D. MARTIN,
United States Circuit Judge.

/s/ MARION S. BOYD,
United States District Judge.

/s/ WILLIAM E. MILLER,
United States District Judge.

APPENDIX B

Received for entry 11:30 A.M. February 4, 1960.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES BAKER, ET AL., PLAINTIFFS,

vs.

JOE C. CARR, ET AL., DEFENDANTS

ORDER DISMISSING COMPLAINT

This cause was heard on the original complaint, the intervening petitions and the amended intervening petition of Ben West, Mayor of the City of Nashville, in accordance with the per curiam opinion heretofore filed; in conformity with said per curiam opinion the first two grounds of defendants' motion to dismiss (1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, are sustained, defendants' motion to dismiss is granted, and the complaint is hereby dismissed.

Enter, this 5th day of February, 1960.

Approved for entry:

DENNY, LEFTWICH & OSBORN
For all Plaintiffs and Intervenors

____, ____,
For Defendants.

JOHN D. MARTIN,
United States Circuit Judge.

MARION S. BOYD,
United States District Judge.

WILLIAM W. MILLER,
United States District Judge.

APPENDIX C

The Statute Involved and Constitutional Provision

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now Tenn. Code Ann. §§ 3-101 to 3-107 (1956):

§ 3-101. *Composition—Counties electing one representative each.*—

The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Summer, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E. S.) ch. 5, Section 1; 1881 (E. S.), ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Shan., Sec. 123; Acts 1919, ch. 147; Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

§ 3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

§ 3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901, ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

§ 3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch. 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

§ 3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives. (Acts 1901, ch. 122, section 6; Shan., section 126a1; Code 1932, section 144.)

§ 3-106. *Joint representatives.*—The following counties, jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.
Second district—Sullivan and Hawkins.
Third district—Washington, Greene and Unicoi.
Fourth district—Jefferson and Hamblen.
Fifth district—Hancock and Grainger.
Sixth district—Scott, Campbell and Union.
Seventh district—Anderson and Morgan.
Eighth district—Knox and Loudon.
Ninth district—Polk and Bradley.
Tenth district—Meigs and Rhea.
Eleventh district—Cumberland, Bledsoe, Sequatchie, VanBuren and Grundy.
Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.
Fourteenth district—Summer, Trousdale and Macon.
Fifteenth district—Davidson and Wilson.
Seventeenth district—Giles, Lewis, Maury and Wayne.
Eighteenth district—Williamson, Cheatham and Robertson.
Nineteenth district—Montgomery and Houston.
Twentieth district—Humphreys and Perry.
Twenty-first district—Benton and Decatur.
Twenty-second district—Henry, Weakley and Carroll.
Twenty-third district—Madison and Henderson.
Twenty-sixth district—Tipton and Lauderdale.
Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

§ 3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.

Second district—Sullivan and Hawkins.
Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.
Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.
Fifth district—Knox.
Sixth district—Knox, Loudon, Anderson and Roane.
Seventh district—McMinn, Bradley, Monroe, and Polk.
Eighth district—Hamilton.
Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.
Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.
Eleventh district—Marion, Franklin, Grundy, and Warren.
Twelfth district—Rutherford, Cannon, and DeKalb.
Thirteenth district—Wilson and Smith.
Fourteenth district—Sumner, Trousdale and Macon.
Fifteenth district—Montgomery and Robertson.
Sixteenth district—Davidson.
Seventeenth district—Davidson.
Eighteenth district—Bedford, Coffee, and Moore.
Nineteenth district—Lincoln and Marshall.
Twentieth district—Maury, Perry and Lewis.
Twenty-first district—Hickman, Williamson and Cheatham.
Twenty-second district—Giles, Lawrence and Wayne.
Twenty-third district—Dickson, Humphreys, Houston and Stewart.
Twenty-fourth district—Henry and Carroll.
Twenty-fifth district—Madison, Henderson and Chester.
Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.
Twenty-seventh district—Gibson.
Twenty-eighth district—Lake, Obion, and Weakley.
Twenty-ninth district—Dyer, Lauderdale and Crockett.
Thirtieth district—Tipton and Shelby.
Thirty-first district—Haywood and Fayette.
Thirty-second district—Shelby.
Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

APPENDIX D

Formula for Apportionment of State Gasoline and Motor Fuel Tax

Source:

Intervening Complaint of Ben West, Mayor, City of Nashville, Tennessee, Section XVIII.

". . . of the seven cents (7¢) collected by the State for the storage and sale of each gallon of gasoline, "a sum equal to that derived from the levy of two cents for each gallon" is paid into a separate fund known as "County Aid Funds", Section 54-403 of the Tennessee Code Annotated providing for the distribution of this fund in the following language:

> "Said 'county aid fund' so derived from the two cents (2¢) gasoline privilege tax, shall be derived and distributed by the department of highways and public works to the various counties of the state as follows: One-half (½) of said fund shall be distributed equally among the ninety-five (95) counties of the state, and fifty percent (50%) of the balance shall be distributed among the ninety-five (95) counties on the basis of area and fifty per cent (50%) on basis of population, as of the most recent federal census, and shall be paid over monthly by the director of accounts of the state to the various county trustees, to be used by the county highway authorities in the building, repairing and improvement of county roads and bridges; * * *"

APPENDIX E

FORMULA FOR APPORTIONMENT OF STATE AID FOR EDUCATION

SOURCE:

INTERVENING COMPLAINT OF BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE, SECTION XXII.

"That by Public Chapter No. 14 enacted by the 1959 General Assembly, provision was made for the distribution of the taxes collected in support of the educational system of the State, whereby the pattern established in previous years by said unlawfully apportioned general assemblies has been continued by fixing first what purports to be a formula whereby each county's and city's ability to contribute to the education of the children therein is determined, and thereinafter exempting by proviso those over-represented counties from all application of the formula and guaranteeing to them school funds in the amounts previously had by such counties, despite their failure to contribute to their own educational systems on the basis required by said formula for the counties in which plaintiffs and other similarly situated live."

APPENDIX F

COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5, IN 1951 TENNESSEE GENERAL ASSEMBLY

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE

Counties	Voting Population 1950*	Ratio	Number of Direct Representatives by Formula**	Actual Direct Representatives 1951
Cannon	5,341	.2672	0	1
Chester	6,391	.3198	0	1
Claiborne	12,799	.6404	0	1
Cocke	12,572	.6291	0	1
Crockett	9,676	.4842	0	1
DeKalb	6,984	.3495	0	1
Dickson	11,294	.5651	0	1
Gibson	48,132	1.4927	1	2
Hardin	16,908	.4792	0	1
Hickman	7,598	.3802	0	1
Jackson	6,719	.3362	0	1
Lake	6,252	.3128	0	1
McNairy	11,601	.5805	0	1
Madison	37,245	1.8636	1	2
Marion	10,998	.5503	0	1
Marshall	11,288	.5648	0	1
Monroe	12,884	.6447	0	1
Moore	2,340	.1171	0	1
Overton	9,474	.4740	0	1
Sevier	12,793	.6401	0	1
Smith	8,731	.4369	0	1
Stewart	5,238	.2621	0	1
White	9,244	.4625	0	1
		Total	2	25

These 23 counties have 23 *more* direct representatives than the Constitution's formula provides.

* *U.S. Census of Population: 1950*, Vol. II, *Characteristics of the Population*, Part 42, Tennessee, Chapter B, Table 42, pp. 92–97.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

These 10 counties have 25 *less* direct representatives than the Constitution's formula provides.

Counties	Voting Population 1950*	Ratio	Number of Direct Representatives by Formula**	Actual Direct Representatives 1951
Anderson	33,990	1.7007	1	0
Bradley	18,273	.9143	1	0
Campbell	17,477	.8745	1	0
Carter	23,303	1.1660	1	0
Davidson	211,930	10.6043	10	6
Hamblen	14,090	.7050	1	0
Hamilton	131,971	6.6034	6	3
Knox	140,559	7.0331	7	3
Shelby	312,345	15.6287	15	7
Sullivan	55,712	2.7876	2	1
			45	20

$$\text{Ratio} = \frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$$

Total Tennessee Voting Population in 1950 was 1,978,548.

APPENDIX G

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-58 STATE GASOLINE AND MOTOR FUEL TAX PER REGISTERED VEHICLE, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE CONSTITUTION.

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	Motor Vehicle Registration 1957	Gasoline & Motor Fuel Tax Apportionment 1957–58	Apportionment per Vehicle	Amount if Apportioned Equally per Vehicle*
Cannon	3,220	$ 144,893	$45.00	$ 51,005
Chester	3,449	149,730	43.41	54,632
Claiborne	5,147	188,944	36.71	81,528
Cocke	7,237	184,050	25.43	114,634
Crockett	4,884	155,987	31.94	77,363
DeKalb	3,413	154,141	45.16	54,062
Dickson	6,873	183,741	26.73	108,868
Gibson	16,340	240,268	14.70	258,826
Hardin	5,555	194,385	34.99	87,991
Hickman	4,006	190,146	47.47	63,455

* $\frac{\text{Total Gasoline and Motor Fuel Tax}}{\text{Total Motor Vehicle Registration exclusive of trailers}} =$

average state aid per vehicle

for above 23 counties with *excess* of direct representatives:

$$\frac{\$4,091,408}{141,169} = \$28.98$$

for above 10 counties with *deficiency* of direct representatives:

$$\frac{\$3,741,648}{613,734} = \$\ 6.10$$

for all counties in the State:

$$\frac{\$19,142,240}{1,208,683} = \$15.84$$

Counties	Motor Vehicle Registration 1957	Gasoline & Motor Fuel Tax Apportionment 1957–58	Apportionment per Vehicle	Amount if Apportioned Equally per Vehicle*
Jackson	2,442	$ 156,252	$63.99	$ 38,681
Lake	3,389	139,389	41.13	53,682
McNairy	5,910	191,254	32.36	93,614
Madison	20,832	252,537	12.12	329,979
Marion	6,559	189,283	28.86	103,895
Marshall	7,052	169,840	24.08	111,704
Monroe	7,938	212,279	27.08	125,738
Moore	1,775	120,929	68.13	28,116
Overton	4,196	172,007	40.99	66,465
Sevier	8,362	203,931	24.39	132,454
Smith	4,622	158,577	34.31	73,212
Stewart	2,436	170,377	69.94	38,568
White	5,532	168,468	30.45	87,627
	141,169	$4,091,408		$2,236,099

Collectively these 23 counties receive 83.0% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

Collectively these 10 counties receive 159.8% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	28,335	$ 226,482	$ 9.71	$ 369,626
Bradley	14,766	186,659	12.64	233,893
Campbell	8,199	200,061	24.40	129,872
Carter	13,224	203,314	15.37	209,468
Davidson	138,233	630,958	4.56	2,189,611
Hamblen	12,377	155,823	12.59	196,052
Hamilton	80,391	471,544	5.87	1,273,393
Knox	84,929	486,355	5.73	1,345,275
Shelby	196,267	892,076	4.55	3,108,869
Sullivan	42,013	288,376	6.86	665,486
	613,734	$3,741,648		$9,721,545

APPENDIX H

COMPARISONS OF APPORTIONMENT OF 1957-1958 STATE AID FOR EDUCATION PER PUPIL IN AVERAGE DAILY ATTENDANCE FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION.

SOURCE: EXHIBIT 8, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	A.D.A. Pupils in County 1957–58	State Aid for Education 1957–58	State Aid per A.D.A. Pupil 1957–58	Amount if Distributed Equally According to A.D.A.*
Cannon	1,930	$ 326,345	$169.09	$ 250,707
Chester	2,041	359,344	176.06	265,126
Claiborne	4,874	775,104	159.03	633,133
Cocke	5,115	696,026	136.08	664,439
Crockett	3,962	623,803	157.45	514,664
DeKalb	2,163	373,391	172.63	280,974
Dickson	3,995	595,595	149.09	518,951
Gibson	9,621	1,388,383	144.31	1,249,768
Hardin	3,927	678,123	172.68	510,117
Hickman	2,488	406,737	163.48	323,191
Jackson	2,087	374,059	179.23	271,101
Lake	2,094	286,475	136.81	272,011
McNairy	4,677	775,233	165.75	607,542

* $\frac{\text{State Aid for Education}}{\text{Pupils in Average Daily Attendance}}$ = average State per A.D.A. Pupil

for above 23 counties with *excess* of direct representatives:

$$\frac{\$14,097,735}{92,595} = \$152.25$$

for above 10 counties with *deficiency* of direct representatives:

$$\frac{\$34,240,736}{318,457} = \$107.72$$

for all counties in the State:

$$\frac{\$90,229,362}{694,627} = \$129.90$$

Counties	A.D.A. Pupils in County 1957–58	State Aid for Education 1957–58	State Aid per A.D.A. Pupil 1957–58	Amount if Distributed Equally According to A.D.A.*
Madison	12,307	$ 1,591,829	$129.34	$1,598,679
Marion	5,091	649,931	129.95	649,630
Marshall	3,440	496,176	144.24	446,856
Monroe	5,580	816,941	146.41	724,842
Moore	780	171,957	220.46	101,322
Overton	3,321	599,156	180.41	431,398
Sevier	5,429	852,308	156.99	705,227
Smith	2,528	383,612	151.75	328,387
Stewart	1,750	360,403	205.94	227,325
White	3,485	516,834	148.30	452,702
	92,595	$14,097,735		$12,028,092

Collectively these 23 counties receive 17.21% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

These 10 counties collectively receive 20.81% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	7,638	$ 1,072,910	$140.47	$ 992,176
Bradley	7,760	951,561	122.62	1,008,024
Campbell	7,866	1,079,792	137.27	1,021,793
Carter	9,733	1,353,684	139.08	1,264,317
Davidson	60,566	6,118,723	101.03	7,867,523
Hamblen	6,194	830,033	134.01	804,601
Hamilton	43,599	4,640,955	106.45	5,663,510
Knox	45,062	4,943,717	109.71	5,853,554
Shelby	106,262	10,185,532	95.85	13,803,434
Sullivan	23,777	3,063,829	128.86	3,088,632
	318,457	$34,240,736		$41,367,565

APPENDIX I

Allocation of Federal Tax Money in Tennessee

Source:

Intervening Complaint of Ben West, Mayor, City of Nashville, Tennessee, Section XXII

The distribution formula contained in Tenn. Code Ann. § 54-403 is applied to those funds collected by the Federal Government for aid to State-maintained roads by means of Tenn. Code Ann. § 54-611 which states as follows:

"54-611. *Use, allocation and matching of federal funds —Formula.*—All funds provided for the federal aid secondary system of roads in this state by the federal aid secondary act of 1944 (Public Law 521, 78th Congress) and all amendments thereto and all funds hereafter allocated to said state system of rural roads by the commissioner of highways, with the approval of the governor, from funds apportioned for or made available to the department of highways under existing laws or laws which may hereafter be passed, shall be expended by said rural roads division for the establishment and construction of roads and bridges on said state systems of rural roads.

"The department of highways shall out of the funds allocated to the state system of rural roads first match the federal funds available under the federal aid secondary road program as now allocated to the various counties and the remainder of such funds so set aside and allocated to the state system of rural roads shall be expended in the various counties of the state upon the state system of rural roads by the same formula upon which the two cent (2¢) gasoline tax is at the present time allocated to the various counties."

APPENDIX J

Received for Entry 10:00 A.M. Jul 31, 1959.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES W. BAKER, ET AL, PLAINTIFF,

v.

JOE C. CARR, SECRETARY OF STATE OF TENNESSEE, ET AL, DEFENDANTS

MEMORANDUM

It is urgently and ably insisted by defendants that the federal question sought to be made by the complaint is "obviously without merit" and that the Court under the doctrine of Ex Parte Poresky, 290 U.S. 30. should therefore dismiss the action without taking steps to constitute a court of three judges under 28 U.S. C. A. Section 2281.

Without undertaking a detailed resume of the allegations of the complaint, the short of the matter is that under the Constitution of Tennessee the members of the House of Representatives are limited to 99 in number and the members of the Senate to 33, and the legislature is directed at the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the number of members of the legislature among the several counties or districts according to the number of qualified voters therein. Tenn. Constit. Art. 2, Secs 4, 5 and 6. However, according to the allegations of the bill, (accepted as true for the purposes of the present motion) these mandatory requirements of the State Constitution have been systematically and continuously violated and ignored by the Legislature of Tennessee. No reapportionment act has been passed since the Act of 1901, and even that act, the amended complaint alleges, was enacted without the enumeration of voters required by the Constitution of the State. As a result of changes in population the existing legislative

apportionment has become progressively discriminatory in character. The failure and refusal of the legislature to abide by plain and unequivocal provisions of the state Constitution have resulted in a debasement of the voting rights of large numbers of citizens as well as in a gross inequality of representation in the legislative councils of the state.

The plaintiffs, suing on their own behalf and on behalf of others similarly situated, reside in geographical areas which have suffered most from the discrimination. They invoke the Constitution of the United States, particularly the equal protection and due process clauses of the Fourteenth Amendment, contending that the legislature of Tennessee in failing to comply with the state Constitution has subjected them to an invidious discrimination that constitutes a denial of the equal protection of the law and a deprivation of due process of law.

The defendants, at this time at least, do not deny the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution. What they do say is that the question involved is exclusively of a political nature and does not present a justiciable controversy, with the result that the Court has no power or jurisdiction to intervene to grant any kind of relief.

The problem of legislative reapportionment has been before the courts on numerous occasions and it would serve no useful purpose to undertake at this time a survey or review of the many decisions on the question. There can be no doubt that generally speaking the courts have been reluctant to enter into an area that might bring them into collision with a coordinate branch of the government. This has resulted in many cases in creating a zone which is "off limits" to judicial authority, leaving a manifest wrong without a judicial remedy. Some courts refuse to intervene upon the ground that the controversy is of a peculiarly political nature, or, as otherwise expressed, is not a justiciable controversy, while the refusal to intervene in other opinions is pitched upon the theory that the courts should exercise their equity discretion to refuse to exercise jurisdiction in a controversy so fraught with political implications.

After a careful review of the allegations of the complaint in the light of the many authorities cited by counsel for

the respective parties, the Court has reached the conclusion that the issues presented are of such character that they should be evaluated and considered by a three-judge court as provided by statute and that this Court should not undertake to dismiss the complaint summarily. Notwithstanding some expressions in the cases which would indicate that there is no hope of judicial relief in a case of this type, the Court is not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration.

Possibly the leading decision of the Supreme Court of the United States upon the general question is Colegrove v. Green, 328 U.S. 549, in which the court sustained the dismissal of an action of qualified voters in certain Illinois Congressional districts to restrain the holding of elections under the provisions of an Illinois law governing such Congressional districts. It may be that the decision in this case closes the door to relief in the present case but the Court is not prepared to say that this conclusion necessarily follows or that it follows so clearly and distinctly that it is not even debatable. In that case seven justices of the Supreme Court heard the appeal. While a majority of four justices held that the action should be dismissed, it is significant that they disagreed as to the reasons for such dismissal, and that three of the justices dissented from the majority and expressed the view that the action should be sustained. Three of the justices in the majority were of the opinion that the question involved was so political in nature that the courts lacked jurisdiction and that the action should be dismissed for that reason. The other majority justice, while agreeing that the action should be dismissed, was of the opinion that the court had jurisdiction but that in the exercise of its discretion as a court of equity, it should decline to exercise such jurisdiction by intervening in a controversy having so many serious problems and complications. The three dissenting justices were of the opinion not only that the court had jurisdiction but that such jurisdiction should actually be exercised to enjoin the holding of the election under the Illinois Act. It is also worthy of note, as pointed out by Justice Frankfurter in his opinion, that the case could have been disposed of by affirming the dismissal on the authority of the prior decision in Wood v. Broom, 287 U.S. 1, holding that where the Congressional

Reapportionment Act did not contain a requirement as to the compactness, contiguity, and equality in population of districts, the state legislature in creating Congressional districts need not observe such requirement.

Whether Colegrove v. Green requires a dismissal of the present action is a question which could be fully considered and determined by a three-judge court. For present purposes it is enough to say that there are differences between that case and the present one that may ultimately prove to be significant. In the first place, Colegrove v. Green involved Congressional districts created by a state legislature under an Act of Congress which contained no requirement that the districts should be set up on the basis of equality or approximate equality of population. Consequently, in failing to redistrict, the legislature of Illinois did not violate any specific provision of its own Constitution or any specific provision of federal law requiring periodic redistricting upon the basis of equality. Further, in the Colegrove case there was ample power vested in Congress under the Federal Constitution to redistrict the state if the existing districts set up by state law had become inequitable. In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.

McDougall v. Green, 335 U.S. 281, another Supreme Court case cited by defendants as requiring dismissal of the present action, was disposed of by the Court in a brief per curiam opinion, but as this Court construes the opinion, the questions here presented were not reached. It is apparent that the court was of the opinion and actually held that the Illinois law attacked in that case did not constitute a denial of the equal protection of the law and did not deprive the plaintiffs of due process of law. It was stated in the opinion that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality". In short, the court held that there was no violation of federal law established, and consequently it was not necessary for the court to decide whether it had power or jurisdiction to grant relief if the violation of federal law had been made to appear. Three

justices dissented from the majority, being of the view that the state law constituted a violation of the equal protection clause of the Fourteenth Amendment and that the court should declare the law void. Mr. Justice Rutledge, as in Colegrove v. Green, concurred in dismissing the action but expressed the opinion that a violation of the Fourteenth Amendment was shown, and that the dismissal should be based upon the discretionary right of a court of equity to refuse to entertain jurisdiction.

In South v. Peters, 339 U.S. 276, the court refused to enjoin adherence in the forthcoming primary to the statute of Georgia prescribing the county unit system. Again in a brief per curiam opinion, the action of the district court in dismissing the action was affirmed, but it is not clear from the opinion whether the refusal to intervene is based upon a lack of jurisdiction or upon the ground that equitable relief should be refused under the particular circumstances of the case. This decision also was by a divided court, two justices believing that the relief should be granted.

A careful reading of the opinion of the Supreme Court of Tennessee in Kidd v. McCanless, 200 Tenn. 273, involving the same laws of Tennessee as the instant case, reveals that the fundamental basis of the decision was the court's opinion that relief could not be granted without completely disrupting, if not destroying, the government of the state. After finding that the de facto doctrine could not be applied and that if the Reapportionment Act was declared unconstitutional the state would be deprived of a legislature, the court held under such circumstances that a declaration of unconstitutionality should be withheld. Thus, the opinion would appear to stand for the proposition that the courts should refuse to intervene in the exercise of a proper discretion in given circumstances, and not for the proposition that jurisdiction does not exist or is completely wanting in such cases. The Supreme Court of the United States simply dismissed the appeal (352 U.S. 920) without comment, citing Colegrove v. Green, supra. The fair inference is that the Supreme Court concurred in the finding of the Tennessee Court that Equitable relief should be denied in a case where to grant such relief the government of the state would be disrupted or thrown into chaos and confusion.

From this brief review of some of the more frequently cited decisions of the Supreme Court, it would appear to be at least debatable whether that court has foreclosed the

question in all cases of legislative reapportionment. It can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention. If the issues are not conclusively settled against the plaintiffs by prior Supreme Court decisions, as to which the Court presently expresses no opinion, the questions of jurisdiction and the propriety of exercising or withholding it, would have to be decided in the light of all relevant factors, including a consideration of the fundamental principle of separation of powers, the desirability of avoiding conflicts with other branches of the government, the delicacy of the relationship existing between the federal and state governments, the possibility of the disruption of the governmental affairs of the state, the nature of the rights claimed by the plaintiffs, the degree and extent to which these rights have been violated, and the ability or inability of the courts to grant effective relief. If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen.

Believing that the questions presented should be considered by a court of three judges, the Court has, pursuant to 28 U.S.C.A. Section 2284, notified the Chief Judge of The Sixth Circuit of the pendency of the action and the ruling of the Court herein denying the motion to dismiss. This will result in the constitution of a court of three judges under 28 U.S.C.A. Section 2281.

/s/ William E. Miller,
United States District Judge.

APPENDIX K

Source: *Baker, et al.* v. *Carr, et al.*, Complaint, Exhibit A

TENNESSEE COUNTIES:

	1900 Voting Population	1950 Voting Population		1900 Voting Population	1950 Voting Population
Anderson	4,066	33,990	Lake	1,972	6,252
Bedford	5,777	14,732	Lauderdale	5,075	14,413
Benton	2,712	7,023	Lawrence	3,103	15,847
Bledsoe	1,490	4,198	Lewis	866	3,413
Blount	4,359	30,353	Lincoln	6,239	15,092
Bradley	3,687	18,273	Loudon	2,467	13,264
Campbell	3,976	17,477	McMinn	4,278	18,347
Cannon	2,781	5,341	McNairy	4,060	11,601
Carroll	5,804	16,472	Macon	2,938	7,974
Carter	3,748	23,303	Madison	8,756	37,245
Cheatham	2,467	5,263	Marion	4,066	10,998
Chester	2,372	6,391	Marshall	4,591	11,288
Claiborne	4,559	12,799	Maury	11,286	24,556
Clay	1,853	4,528	Meigs	1,604	3,039
Cocke	4,072	12,572	Monroe	4,065	12,884
Coffee	3,720	13,406	Montgomery	8,712	26,284
Crockett	3,556	9,676	Moore	1,333	2,340
Cumberland	2,237	9,593	Morgan	2,544	8,308
Davidson	17,906	211,930	Obion	7,173	18,434
Decatur	2,356	5,563	Overton	2,925	9,474
Dekalb	3,656	6,984	Perry	1,957	3,711
Dickson	4,402	11,294	Pickett	1,135	2,565
Dyer	5,935	20,062	Polk	2,679	7,339
Fayette	6,180	13,577	Putnam	3,679	17,071
Fentress	1,331	7,057	Rhea	3,405	8,937
Franklin	4,686	14,297	Roane	5,470	17,639
Gibson	9,206	29,832	Robertson	6,274	16,456
Giles	7,565	15,935	Rutherford	7,677	25,316
Grainger	3,676	7,125	Scott	2,378	8,417
Greene	6,967	23,649	Sequatchie	766	2,904
Grundy	1,737	6,540	Sevier	4,434	12,793
Hamblen	2,997	14,090	Shelby	43,843	312,345
Hamilton	16,892	131,971	Smith	4,372	8,731
Hancock	2,274	4,710	Stewart	3,512	5,238
Hardeman	5,119	13,565	Sullivan	6,059	55,712
Hardin	4,357	9,577	Sumner	6,394	20,143
Hawkins	5,192	16,900	Tipton	6,970	15,944
Haywood	5,447	13,934	Trousdale	1,482	3,351
Henderson	4,050	10,199	Unicoi	1,320	8,787
Henry	5,873	15,465	Union	2,841	4,600
Hickman	3,891	7,598	Van Buren	700	2,039
Houston	1,545	3,084	Warren	3,864	13,337
Humphreys	3,203	6,588	Washington	5,408	36,967
Jackson	3,178	6,719	Wayne	2,974	7,176
James	1,281	.....	Weakley	7,862	18,007
Jefferson	4,130	11,359	White	3,118	9,244
Johnson	2,211	6,649	Williamson	6,271	14,064
Knox	19,049	140,559	Wilson	6,550	16,459

APPENDIX L

REPRESENTATIVE TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950

SOURCE: EXHIBIT 7, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Senatorial District Number	Counties	Total Voting Population 1900	Voting Population per Senator 1900	Total Voting Population 1950	Voting Population per Senator 1950
1	Carter	3,748		23,303	
	Greene	6,967		23,649	
	Johnson	2,211		6,649	
	Unicoi	1,320		8,787	
	Washington	5,408		36,967	
			19,654		99,355
2	Hawkins	5,192		16,900	
	Sullivan	6,059		55,712	
			11,251		72,612
4	Blount	4,359		30,353	
	Cocke	4,072		12,572	
	Hamblen	2,997		14,090	
	Jefferson	4,130		11,359	
	Sevier	4,434		12,793	
			19,992		81,167
8	Hamilton	16,892		131,971	
			16,892		131,971
11	Franklin	4,686		14,297	
	Grundy	1,737		6,540	
	Marion	4,066		10,998	
	Warren	3,804		13,337	
			14,293		45,172
16	Davidson	33,311		211,930	
			16,656		105,965
17	Davidson	33,311		211,930	
			16,656		105,665

Senatorial District Number	Counties	Total Voting Population 1900	Voting Population per Senator 1900	Total Voting Population 1950	Voting Population per Senator 1950
20	Lewis	1,075		3,413	
	Maury	11,286		24,556	
	Perry	1,957		3,711	
			14,318		31,680
22	Giles	7,565		15,935	
	Lawrence	3,730		15,847	
	Wayne	2,974		7,176	
			14,269		38,958
25	Chester	2,372		6,391	
	Henderson	4,050		10,199	
	Madison	8,756		37,245	
			15,178		53,835
28	Lake	1,972		6,252	
	Obion	7,173		18,444	
	Weakley	7,862		18,007	
			17,007		42,703
32	Shelby	43,843		312,345	
			16,938**		109,430**

** In cases where a county has both a direct and floaterial senator, the sum of the voting population of all the counties in such floaterial district is divided by the number of direct and floaterial districts involved to determine the average population for each district.

NOTE: Assuming the thirty-three senators are apportioned only on the basis of the voting population. in 1900 each district should have a population of 14,769 and in 1950 a population of 59,956. Using the above assumptions the results of the 1901 and the 1951 Senate apportionment follows below.

	Districts having less than 90% of the Required Population (Over Represented)	Districts having more than 110% of the Required Population (Under Represented)
1900	10	12
1950	19	11

APPENDIX M

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-1958 STATE GASOLINE AND MOTOR FUEL TAX PER CAPITA, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF [illegible] ECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	County Population 1950	Gasoline and Motor Fuel Tax Apportionment 1957–1958	Apportionment Per Capita	Amount if Apportioned Equally Per Capita*
Cannon	9,174	$ 144,893	$15.79	$ 53,393
Chester	11,149	149,730	13.43	64,887
Claiborne	24,788	188,944	6.80	144,266
Cocke	22,991	184,050	8.01	133,808
Crockett	16,624	155,987	9.38	96,752
DeKalb	11,680	154,141	13.20	67,978
Dickson	18,805	183,741	9.77	109,445
Gibson	48,132	240,268	4.99	280,128
Hardin	16,908	194,385	11.50	98,405
Hickman	13,353	190,146	14.24	77,714
Jackson	12,348	156,252	12.65	71,865
Lake	11,655	139,389	11.96	67,832
McNairy	20,390	191,254	9.38	118,670

*$\frac{\text{Total Gasoline \& Motor Fuel Tax}}{\text{Total State Population 1950}}$ = average state aid per capita.

for above counties with *excess* of direct representatives:

$$\frac{\$4,091,408}{445,292} = \$9.19$$

for above 10 counties with deficiency of direct representatives:

$$\frac{\$3,741,648}{1,522,998} = \$2.46$$

for all counties in the State: $\frac{\$19,142,240}{3,291,718} = \$5.82$

Counties	County Population 1950	Gasoline and Motor Fuel Tax Apportionment 1957–1958	Apportionment Per Capita	Amount if Apportioned Equally Per Capita*
Madison	60,128	$252,537	$ 4.20	$349,951
Marion	20,520	189,283	9.22	119,426
Marshall	17,768	169,849	9.56	103,410
Monroe	24,513	212,279	8.66	142,666
Moore	3,948	120,929	30.63	22,977
Overton	17,566	172,007	9.79	102,234
Sevier	23,375	203,931	8.72	136,043
Smith	14,098	158,577	11.25	82,050
Stewar	9,175	170,377	18.57	53,399
White	16,204	168,468	10.40	94,307
	445,292	$4,091,408		$2,591,606

Collectively these 23 counties receive 57.9% more state aid than formula* would allow and have 23 more direct representatives that Constitution's formula provides.

Collectively these 10 counties receive 136.9% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	59,407	$226,482	$3.81	$345,749
Bradley	32,338	186,659	5.77	188,207
Campbell	34,369	200,061	5.82	200,028
Carter	42,432	203,314	4.79	246,954
Davidson	321,758	630,958	1.96	1,872,632
Hamblen	23,976	155,823	6.50	139,540
Hamilton	208,255	471,544	2.26	1,212,044
Knox	223,007	486,355	2.18	1,297,901
Shelby	482,393	892,076	1.85	2,807,527
Sullivan	95,063	288,376	3.03	553,267
	1,522,998	$3,741,648		$8,863,849

APPENDIX N

28 U.S.C. §1343:

"*Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"*Proceeding in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their

civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

ADDENDUM

APPENDIX O

TENN. CONST., art. I § 5 (1870):

Sec. 5 *Elections to be free and equal; right of suffrage declared.*—That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

TENN. CONST., art. II, §§ 4, 5 and 6 (1870):

Sec. 4 *Census.*—An enumeration of the qualified voters, and an apportionment of the representatives in the general assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5 *Apportionment of representatives.*—The number of representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the state shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6 *Apportionment of senators.*—The number of senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the house of representatives, shall be made up to such county or counties in the senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

TENN. CONST., art. XI, § 3 (1870):

Sec. 3 *Amendments to the constitution, etc.; not oftener than once in six years; but legislature may at any time submit question of calling convention.*—Any amendment or amendments to this constitution may be proposed in the senate or house of representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the general assembly then next to be chosen, and shall be published six months previous to the time of making such choice; and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the general assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for representatives, voting in their favor, such amendment or amendments shall become part of this constitution. When any amendment or amendments to the constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house. The legislature shall not propose amendments to the constitution oftener than once in six years. The legislature shall have the right, at any time by law, to submit to the people the question of calling a convention to alter, reform or abolish this constitution, and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the convention shall assemble in such mode and manner as shall be prescribed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1961

No. 959 1036

CHARLES W. BAKER et al.,
Appellants,

v.

JOE C. CARR et al.,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

GEORGE F. McCANLESS,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

CHARLES W. BAKER et al.,
Appellants,

v.

JOE C. CARR et al.,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

The appellees, Joe C. Carr et al., for their statement in opposition to the appellants' statement of jurisdiction, and in support of their motion to dismiss, respectfully show the following:

I.

STATEMENT OF ISSUES ON APPEAL.

This action was brought in the United States District Court for the Middle Division of Tennessee by Charles W. Baker and other voters and residents of certain counties

in Tennessee against the Secretary of State, the Attorney General, the Co-ordinator of Elections, and the members of the State Board of Elections, seeking to challenge, under the equal protection and due process clauses of the Fourteenth Amendment, the existing legislative apportionment in Tennessee.

The Constitution of Tennessee, Article II, Sections 4, 5 and 6, directs the legislature at the expiration of each ten-year period after 1871 to make an enumeration of the qualified voters and to apportion the members of the legislature among the several counties or districts according to the number of qualified voters therein. It provides for ninety-nine members of the House of Representatives and thirty-three members of the Senate. No reapportionment has been made by the legislature since the Act of 1901, and the distribution of legislative seats remain substantially as provided for in that act.

The appellant averred that the legislative distribution is disproportionate to the distribution of population in the state, a condition brought about by shifts or changes in population since 1901, and that the result of the failure of the legislature to enact reapportionment legislation is an inequality of legislative representation, a debasement of their voting rights, and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. The appellants further averred that the inequality of representation has resulted in legislative discrimination against them with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power.

The appellants asked the District Court: (1) to declare the apportionment Act of 1901 unconstitutional and to enjoin its enforcement, (2) to order an election at large without regard to counties or districts, and (3) in the alternative to direct the appellees to hold an election in

accordance with the formula for legislative representation provided in the Tennessee Constitution, using the 1950 or a subsequent federal census to determine the number of qualified voters.

The appellees filed a motion to dismiss on the grounds that the District Court did not have jurisdiction of the subject matter of the suit, that the appellants had not stated a claim upon which relief could be granted, and that indispensable parties had not been joined.

The three-judge Court sustained the motion to dismiss and denied the relief prayed for, saying:

> "The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. **Colegrove v. Green**, 328 U. S. 549; **Cook v. Fortson and Turman et al. v. Duckworth**, 329 U. S. 675; **Colegrove v. Barrett**, 330 U. S. 804; **McDougal et al. v. Green**, 335 U. S. 281; **South et al. v. Peters**, 339 U. S. 276; **Remmey v. Smith**, 342 U. S. 916; **Anderson v. Jordan**, 343 U. S. 912; **Kidd v. McCanless et al.**, 352 U. S. 920; **Radford v. Gary**, 352 U. S. 991." 179 F. Supp. 826.

By the attempt to appeal to this Court, the only question raised is whether the appellants have been denied equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. They theorize that due to the increase and shifts in population, an elector's ballot is given more weight in

some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. In other words, they contend that some assembly districts are over-represented while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts. Relying upon the Federal population census of 1950, the appellants have alleged inequalities of representation although the State Constitution requires "an enumeration of qualified voters". Article II, Section 4, Constitution of Tennessee, Appendix A. Nevertheless, the appellants insist that a majority of the General Assembly represents less than a majority of the qualified voters. This, they say, is undemocratic and denies them a republican form of government. They contend that the concept of "majority rule" is so ingrained into our constitutional system that they are denied equal protection under the laws as guaranteed by the Federal Constitution.

Also, the appellants argue that since a minority of the qualified voters elect a majority of the Assembly that their right of franchise is debased so that they are denied the right of equal suffrage in free and equal elections. They now attempt to invoke the jurisdiction of this Court, although the question presented is purely political and legislative.

Significantly, the complaint fails to allege, and we do not understand that the appellants insist, that there is a prior valid apportionment law upon which to fall back if the present apportionment laws should be declared unconstitutional. There is no charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Article IV, Section 1, Appendix B. A lack of purity of the ballot box is not charged. There is no suggestion

that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the General Assembly are elected by less than a majority of the votes cast in the respective Assembly districts. Therefore, the appellants are exercising every right of franchise to which they are entitled under the Constitution. Notwithstanding this, the appellants insist that they are the subjects of invidious discrimination at the ballot box.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE ATTEMPTED APPEAL.

The appeal is based on the premise, which is completely false, that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment.

A. There Is No Denial of the Right to Vote.

The appellants do not charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Article IV, Section 1. They do not charge a lack of purity at the ballot box. There is no suggestion that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the legislature are elected by less than a majority of the votes cast in the respective legislative districts.

The gravamen of the appellants' complaint is that they do not have the opportunity to vote for as many members of the legislature as they think they should. Their only

contention is that due to the increase and shifts in population, an elector's ballot is given more weight in some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. They contend that some assembly districts are over-represented while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts.

In contrast, the cases relied upon by the appellants, **United States v. Cruikshank**, 92 U. S. 542; **Nixon v. Herndon**, 273 U. S. 536; **Terry v. Adams**, 345 U. S. 461, involve the denial of individual voting rights. The cases in nowise support the appellants' premise that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment.

General allegations relative to discrimination in the allocation of state taxes do not affect the basic question. **N. C. & St. L. R. Co. v. Wallace**, 288 U. S. 249; **Dane v. Jackson**, 256 U. S. 259.

The appellants' insistence that inequality of legislative representation is equivalent to a complete denial of the right to vote is specious. It is generally known that candidates for public office are frequently elected by less than a majority of the votes cast in an election where there are many candidates, or in situations where less than a majority of the electorate votes in an election. Speculation always arises in a presidential election year that one of the candidates may receive a majority of the popular vote but less than a majority in the electoral college.

It follows that the use by appellants of the terms "debased votes" and "diluted voting rights", are inaccurate and misleading. The appellants use the terms to characterize what they denominate as "rights" guaranteed by

the Fourteenth Amendment when, in fact, the sole complaint is the inequality of legislative representation.

In essence the question of inequality of legislative representation raises the issue of whether the appellants enjoy a republican form of government. The violation of this constitutional guaranty cannot be challenged in the courts. **Ohio ex rel. Bryant v. Akron Metropolitan Park District,** 281 U. S. 74; **Colegrove v. Green,** 328 U. S. 549.

Thus, no question of denial of the right to vote is presented on the record.

B. The Fourteenth Amendment Does Not Guarantee Equality of Voting Strength.

The Fourteenth Amendment does not guarantee equality of voting strength, and this Court has not so held.

The Court, in **Minor v. Happersett,** 21 Wall. 162, in considering whether the Fourteenth Amendment guaranteed rights of suffrage to all citizens, said:

> "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and state laws, and not directly upon the citizen." 21 Wall. 162.

The Court reaffirmed this view in **Breedlove v. Suttles,** 302 U. S. 277, saying:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as re-

> strained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. **Minor v. Happersett**, 21 Wall. 162, 170 et seq., 22 L. Ed. 627, 629; **Ex parte Yarbrough**, 110 U. S. 651, 664, 665, 28 L. Ed. 275, 4 S. Ct. 152; **McPherson v. Blacker**, 146 U. S. 1, 37, 38, 36 L. Ed. 869, 878, 13 S. Ct. 3; **Guin v. United States**, 238 U. S. 347, 362, 59 L. Ed. 1340, 1346, 35 S. Ct. 926, L. R. A. 1916A, 1124." 302 U. S. 283.

Actually, the appellants, on pages 12 and 13 of their statement, concede that the Constitution of the United States "does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves."

It is likewise true that the power to enforce the guaranty of a republican form of government rests in Congress and not in the courts.

In **Luther v. Borden**, 7 How. 1, this Court said:

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government. . . . It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere." 7 How. 42, 43.

Since inequality of legislative representation is not an abridgement of the right to vote guaranteed by the Fourteenth Amendment, the premise upon which the appeal is based is false.

III.

THE CIVIL RIGHTS ACT AMENDMENTS OF 1957 ARE NOT APPLICABLE TO THIS CASE.

The appellants insist that they are entitled to relief under the provisions of the 1957 Amendment to the Civil Rights Act. Public Law 85-315, Part III, Sec. 121, 71 Stat. 637. The amendment simply states,

> "To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

According to the appellants, the thrust of this lawsuit is based upon the violation of their civil rights, and their right to relief must be found in the context of the amendment. Thus, it is said, that the case at bar differs from the plethora of other cases in which this Court has declared its want of jurisdiction and inability to grant relief.

This insistence by the appellants does not raise a substantial federal question. The principles announced in the former adjudications of this Court concerning state reapportionment problems are unchanged. It follows that for a number of reasons the 1957 Civil Rights Amendment does not aid the appellants.

First, historically this Court has never treated complaints about state reapportionment as falling within the orbit of civil rights. If disproportionate geographical representation in state legislative bodies could have been reasonably treated as a federally protected civil right, the statutes would have been invoked long ago. Thus, it is clear that reliance upon the civil rights statutes runs

counter to the experience of the courts in dealing with the problem.

Secondly, the phraseology in the amendment fails to encompass geographical reapportionment of state assembly seats. It is neither specifically nor impliedly mentioned or defined as a federally protected right. Although we do not concede that Congress may compel state reapportionment, there is nothing in the language used indicating that Congress so intended. On the contrary, it should be assumed that the Congress would have used appropriate and specific language in defining and setting forth reapportionment as a civil right. A fortiori "the right to vote" was so included. Certainly, it must be assumed that Congress was cognizant of the decisions of this Court, and would have clearly expressed its purpose to broaden the scope of the statute to include state legislative representation. The failure of the Congress to explicitly express itself in this field compels the conclusion that Congress had another purpose in mind.

Thirdly, the appellants have failed to properly construe the 1957 amendment. The applicable rules of construction, if it is necessary to resort to them, lead to the unmistakable conclusion that the apportionment of state legislative representation is not a civil right.

(1) The legislative history of the 1957 amendment is contrary to the insistence of the appellants. The treatment accorded the amendment by the Judiciary sub-committee in the House of Representatives indicates that the history of the amendment supports the position of the appellees rather than the appellants. United States Congressional and Administrative News, Eighty-fifth Congress, Vol. 2, pp. 1966-2015.

The majority reported that the purpose of the Civil Rights Act of 1957, of which 28 U. S. C. A. 1343 (4) was known as "Part III", to be as follows:

"The bill is designed to protect the civil rights of persons within the jurisdiction of the United States In order to accomplish that objective the bill provides the establishment of a bipartisan commission to investigate asserted violations of law in the field of civil rights which involve the right to vote and to make studies and recommendations of the legal developments and policies of the Federal Government with respect to the equal protection of laws under the Constitution of the United States. It also provides for an additional Assistant Attorney General, who would be in charge of a Civil Rights Division in the Department of Justice. The bill amends existing law so as to permit the Federal Government to seek from the civil courts preventive or other necessary relief in civil-rights cases. Finally, it proposes the enactment of new laws to assist in the enforcement of the right to vote."

The discussion of "Part III" emphasizes that it provided an additional remedy for the enforcement of "Civil Rights" in the three situations specified in 42 U. S. C. A. 1985. They include a right of action for damages against a person who conspires with an officer of the United States to injure or deprive another of his civil rights; an action for damages against any person who conspires to intimidate or injure parties, witnesses or jurors as to any action pending in a state court which denies one of due process or equal protection; and an action for damages against anyone who conspires to deny one's right to due process or equal protection, or the right to vote in elections for federal officers (pp. 1974-5). Under Part III, the new remedy allows the Attorney General to institute an action in these instances where there is an injury or a threatened injury to civil rights in three categories mentioned. Within this range Congress authorized direct action in the federal courts without resort to state administrative and judicial tribunals. The unmistakable intent of Congress was to deal

with strengthening the existing civil rights statutes, and not to create or define a new civil right encompassing the problem presented in this case.

(2) The aims of Congress were clearly expressed as to the means of securing and protecting the right to vote. The majority of the sub-committee was acutely aware of the cases relied upon by the appellants, and cited most of them as authority for protecting the right to vote for federal officers. However, the report also notes the role of the states and declares:

> "Nothing contained in the proposal in any way infringes upon the power given to the states under the constitution to fix the qualifications of voters. It must be remembered that such power, however, is not unlimited, as indicated by the express power given to Congress to regulate the manner of conducting elections as well as by the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations" (Ibid. pp. 1977-8).

The minority of the sub-committee was mindful of the purpose and scope of "Part III." Again, the understanding was that there was an implementation of existing law by adding an additional remedy for securing and protecting civil rights (Ibid. pp. 2001-2). The discussion is devoid of any suggestion that the amendment was intended to do more than protect existing civil rights and the right of franchise.

(3) The Attorney General understood and intended that "Part III" implemented existing laws enacted for the protection of voting rights. He argued that there should be a civil as well as criminal remedy for interference or denial of the right of franchise. His objective was stated as follows:

"Our ultimate goal is the safeguarding of the free exercise of the voting right subject to the legitimate power of the state to prescribe necessary and fair voting qualifications."[1]

The administrative construction of the amendment when pending in the Congress should be a polestar in ascertaining the object sought to be remedied. When this is coupled with the report of the majority of the sub-committee, the conclusion is inescapable that Congress was dealing purely with voting rights as distinguished from representation in a state legislature.

(4) The Congress clearly stated its purpose and intent in the amendment. The additional remedy was provided for protecting existing civil rights and the right to vote. The use of the phrase "including the right to vote" was not by inadvertence. It must be remembered that the Civil Rights Act of 1957 also amended 42 U. S. C. A. 1971 by adding subsections (b) (c) (d) and (e). These broadened the scope of 42 U. S. C. A. 1971 not only as to the character of the offenses included but contained additional remedies applicable solely to the statute. Since this was a special enactment about one phase of the civil rights problem, the courts might have construed the remedy as being exclusive and separate from the remedy provided in Part III. To obviate this construction, the Congress inserted language clearly embracing the right to vote as coming within the range of the remedy allowable under Part III.

Thus the Civil Rights Act Amendments of 1957, 28 U. S. C. 1343 (4), can have no application to this case.

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[1] Ibid. p. 1979, Letter dated April 9, 1956, addressed to the Speaker of the House of Representatives from Herbert Brownell, Jr., Attorney General.

IV.

THIS COURT HAS CONSISTENTLY REFUSED TO EXERCISE ITS EQUITY POWERS IN CASES POSING POLITICAL ISSUES ARISING FROM A STATE'S GEOGRAPHICAL DISTRIBUTION OF ELECTORAL STRENGTH AMONG ITS POLITICAL SUBDIVISIONS.

This Court has consistently refused to exercise its equity powers in cases involving political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. The character of the political question presented is not the same as in those cases where relief is granted for a private wrong.

In **Colegrove v. Green**, 328 U. S. 549, the question of the exercise of the equity powers of this Court to correct an improper apportionment of the congressional districts was squarely presented. The Court went directly to the heart of the matter and said:

> "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by considerations on the basis of which this Court, from time to time, has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." 328 U. S. 552.

The Court then pointed out:

> "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that

will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin**, 24 How. (U. S.) 66, 16 L. Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson**, 4 Wall. (U. S.) 475, 18 L. Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon**, 223 U. S. 118, 56 L. Ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

In **Turman v. Duckworth**, 329 U. S. 675, and **Cook v. Fortson**, 329 U. S. 675, the question presented was whether the county unit system of voting in Georgia deprived the plaintiffs of the equal protection of the laws. This Court ordered the District Court to dismiss the bill in each case.

Subsequently, the Court, in **MacDougall v. Green**, 335 U. S. 281, refused to exercise its jurisdiction where an Illinois statute required a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties. The Court referred to **Colegrove v. Green**, supra, and held that the statute was not in violation of the Fourteenth Amendment.

Georgia's county unit system of voting was again challenged in **South v. Peters**, 339 U. S. 276. This Court affirmed the District Court's action in dismissing the petition and said:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

In **Cox v. Peters**, 342 U. S. 936, another assault was made upon Georgia's county unit laws, and it was insisted by the petitioner that his vote had not received its full value in violation of the equal protection clause of the Fourteenth Amendment. The motion to dismiss was granted for want of a substantial federal question.

In **Remmey v. Smith**, 342 U. S. 916, the District Court had refused to enjoin the enforcement of the Pennsylvania apportionment laws, and had rejected the insistence that those laws violated the due process and equal protection clauses. This Court granted the motion to dismiss the appeal on the ground that it presented no substantial federal question.

The question of the geographical distribution of electoral strength was next before this Court in **Anderson v. Jordan**, 343 U. S. 912, on an attempted appeal from the decision of the Supreme Court of California. The appeal was dismissed on the authority of **Colegrove v. Green**, supra; **MacDougall v. Green**, supra, and **Wood v. Broom**, 287 U. S. 1.

In **Kidd v. McCanless**, 352 U. S. 920, the appeal involved the identical apportionment statutes now before the Court. The appeal was dismissed on the authority of **Colegrove v. Green**, supra, and **Anderson v. Jordan**, supra. The case will be discussed further in this statement.

This Court affirmed the District Court's dismissal of the action in **Radford v. Gary**, 352 U. S. 991, where it was contended that the Oklahoma apportionment laws were in violation of the Constitution of the United States. The Court cited **Colegrove v. Green**, supra, and **Kidd v. McCanless**, supra.

The Court likewise refused to consider the question of geographical distribution of electoral strength in **Hartsfield v. Sloan**, 357 U. S. 916. The Court was of the opinion that the motion for leave to file a petition for writ of mandamus to compel the District Judge to assemble a three-judge court to pass on the validity of the Georgia county unit law should be denied.

Thus, this Court has consistently, and without exception, refused to exercise its equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.

The appellants' assertion that the present appeal presents a case of first impression is without foundation and rests solely upon the false premise that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment. This insistence has previously been rejected by this Court.

V.

THIS COURT HAS PREVIOUSLY REFUSED TO CONSIDER THE SAME CONSTITUTIONAL ISSUES AND CONTENTIONS WITH RESPECT TO THE IDENTICAL TENNESSEE APPORTIONMENT STATUTES INVOLVED IN THIS SUIT.

Contrary to the appellants' assertion, the appeal presented on the record herein is not unique on its facts nor does it present a case of first impression.

This Court has previously refused to consider the same constitutional issues and contentions with respect to the identical Tennessee apportionment statutes involved in this suit.

In 1955 a similar suit was filed in the Chancery Court of Davidson County, at Nashville, Tennessee, and subsequently appealed to the Supreme Court of Tennessee. That Court in **Kidd v. McCanless**, 200 Tenn. 273 at pages 275 to 277, summarized the allegations in the bill as follows:

> "The suit was filed on March 8, 1955, by Gates Kidd and four other voters and residents of Washington County, Tennessee, along with six voters and residents of Carter County, and two voters and residents of Davidson County, against the Attorney General of Tennessee, the Secretary of State, the members of the State Board of Elections, the members of the Republican State Primary Election Commission, the members of the Democratic State Primary Election Commission, the members of the Washington County Election Commission, the Carter County Election Commission, and the Davidson County Election Commission. By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made

in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 to 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 to 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct the elections for members of the General Assembly according to said Act unless they are restrained by the court.

"The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the alternative the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with

the decree mathematically reapportioning the State." 200 Tenn. 275 to 277.

The Supreme Court of Tennessee, in dismissing the bill, said:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

A petition was filed seeking to have this Court review and reverse the action of the Supreme Court of Tennessee. The appeal was rejected in **Kidd v. McCanless**, 352 U. S. 920.

In rejecting the appeal, this Court cited **Colegrove v. Green**, supra, and **Anderson v. Jordan**, supra.

Thereafter this Court cited **Kidd v. McCanless**, supra, along with **Colegrove v. Green**, supra, as authority for its action in affirming the judgment of the three-judge District Court in dismissing the complaint in **Radford v. Gary**, supra.

It is submitted that the action of this Court in rejecting the appeal in the Kidd case upon the authority of **Colegrove v. Green**, and in relying upon the Kidd case as authority for affirming the District Court's judgment in **Radford v. Gary**, virtually requires the dismissal of the present appeal on the ground of res judicata.

It likewise follows that the appellants' assertion that the appeal is unique on its facts and presents a case of first impression is without foundation.

VI.

THIS COURT IS WITHOUT AUTHORITY TO GRANT RELIEF.

This Court is without authority to grant relief not only because the issue is political in nature but also because it is peculiarly political in nature.

The character of the political question presented is not the same as in those cases where relief is granted for a private wrong. The civil rights cases relied upon by the appellants, **Nixon v. Herndon**, supra; **United States v. Classic**, 313 U. S. 299; **Smith v. Allwright**, 321 U. S. 649; and **Terry v. Adams**, supra, involved denial of the right to vote at the polls or a lack of purity of the ballot box. In those cases the Court was concerned with the denial of individual voting rights.

In contrast, the question presented by the attempted appeal in this case affects the people of Tennessee as a body politic, and this is emphasized by the fact that certain municipalities are parties to the suit.

This distinction was recognized in **Colegrove v. Green**, supra, where this Court stated that the basis of the suit is

"a wrong suffered by Illinois as a polity."

In **Colegrove v. Green**, the Court said:

"We are of opinion that the petitioners ask of this court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our

government revealed this issue to be a peculiarly political nature and therefore not meet for judicial determination." 328 U. S. 552.

And the Court continued:

"To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin**, 24 How. (U. S.) 66, 16 L. ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson**, 4 Wall. (U. S.) 475, 18 L. ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon**, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

Again in **South v. Peters**, supra, the Court said:

". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

The wisdom of the rule is emphasized when considered in its application to the case now before the Court.

In **Kidd v. McCanless**, 200 Tenn. 273, the Supreme Court of Tennessee said:

> "It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the de facto doctrine cannot be applied to maintain the present members of the General Assembly in office. . . . Therefore we would not only not have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members of the General Assembly." 200 Tenn. 281.

The Supreme Court of Tennessee then held:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

Thus the Supreme Court of Tennessee has decided that if the apportionment laws are held unconstitutional the State itself will be destroyed. This would necessarily result if the General Assembly is declared to be non-existent. Thereby, the basic framework of constitutional government in Tennessee would be destroyed. Instead of having three departments of government, the State would be reduced to two. Consequently, a democratic form of constitutional government as guaranteed by Article IV, Section 4, Constitution of the United States, would end by a decision of this Court.

Despite the holding of the Supreme Court of Tennessee in **Kidd v. McCanless**, the appellants insist that this Court is not bound to accept the finding of the Tennessee Court that an invalidation of the 1901 Apportionment Act would

prevent the legislature from functioning in a de facto capacity to enact new apportionment legislation. The appellants cite no authority to support this assertion. This insistence is without precedent or reason and is directly in conflict with the holdings of this Court.

In **Highland Farms Dairy, Inc., v. Agnew**, 300 U. S. 608, this Court said:

> "A judgment by the highest Court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere." 300 U. S. 613.

What more serious question involving a state constitution could there be?

It follows that the problem presented here affects the people of Tennessee as a body politic and sovereign, and is precisely the type of "political thicket" that this Court, in **Colegrove v. Green**, said courts ought not to enter.

The appellants are asking this Court to do indirectly what this Court has said it could not do directly.

The appellants suggest that the Court could enjoin state election officials from holding any future election under the Act of 1901, or that the Court could affirm the District Court's finding that a violation of appellants' rights had occurred and announce its intention to consider at a future date the question of relief.

It is settled beyond doubt, and the appellants must concede, that this Court could not compel the Tennessee legislature to enact new apportionment legislation. To do so would be destructive of tripartite government and would constitute an infringement by the judiciary on the prerogatives of the legislative branch. We submit that the Court should decline to take steps to accomplish this same unconstitutional result by any other affirmative action. If the Court cannot enter through the front door, as it has

clearly said it has no right to do, it should not be asked to enter through the back door.

Clearly, we think, the decisions of this Court declare the problem of reapportionment to be a political question which should be addressed to the people of Tennessee and their General Assembly. The Constitution of Tennessee belongs to its people. They are capable of determining political and governmental issues arising in connection with their state government. They should be permitted to resolve the question of reapportionment in their own way. As this Court said in **Colegrove v. Green**, "the remedy for unfairness in districting is to secure State legislatures that will apportion properly."

Wherefore, the appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the District Court of the United States for the Middle District of Tennessee be affirmed.

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MILTON P. RICE,
Assistant Attorney General of Tennessee,

.....

JAMES M. GLASGOW,
Assistant Attorney General of Tennessee,

.....

JACK WILSON,
Assistant Attorney General of Tennessee,
Attorneys for Appellees.

Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the appellees, hereby certifies that on the ..... day of June, 1960, he served the within and foregoing statement in opposition to the appellants' statement of jurisdiction and motion to dismiss on Charles W. Baker et al., appellants, by depositing at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing statement securely enclosed in an envelope, postage duly prepaid, addressed to one of the attorneys of the appellants, Z. T. Osborn, Jr., Denney, Leftwich & Osborn, Nashville Trust Building, Nashville, Tennessee.

.....

James M. Glasgow,
Assistant Attorney General.

Mailing Address:
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APPENDIX A.

Constitution of Tennessee.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enu-

meration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

APPENDIX B.

Constitution of Tennessee.

Article IV.

Sec. 1. Right to vote—Election precincts—Military duty.—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this State shall be subject to the performance of military duty as may be prescribed by law.

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No. 108 6

SUPREME COURT, U.S.
FILED
JUL 12 1960
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IN THE

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OCTOBER TERM, [redacted] 1961

CHARLES W. BAKER, ET AL.,
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JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY TO APPELLEES' STATEMENT IN OPPOSITION AND MOTION TO DISMISS

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IN THE

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REPLY TO APPELLEES' STATEMENT IN OPPOSITION AND MOTION TO DISMISS

I

THE APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION BECAUSE CONTRARY TO THE GUARANTEES OF THE FOURTEENTH AMENDMENT THE COMPLAINING TENNESSEE VOTERS ARE DENIED UNDER COLOR OF STATE LAW THE VOTE EQUAL TO ALL OTHER TENNESSEE VOTERS REQUIRED BY THE STATE CONSTITUTION.

The Attorney General of Tennessee (for the Apellees) purports to make argument on behalf of the complaining voters (Appellants) of which they want no

part. The complaining voters are not charging inequality of representation under the Fourteenth Amendment (Statement in Op., p. 5, 8). On the contrary, they claim equality in voting rights as provided by the Constitution of Tennessee, and charge that the legislative attempt (successful so far) to deny that equality results in a violation of the equal protection of the laws. This is an important distinction, which reflects the manner in which the Fourteenth Amendment operates. It does not in itself decree equality in voting rights. It says that if the state policy is to afford equal voting rights (expressed here by the people of Tennessee in their organic law), the attempt by state officers, under color of law, to deny such equality to some of the citizens is a denial of equal protection.

The fact that this unlawful denial may be perpetrated by, or originate with, the legislators of the state does not prevent the federal courts from dealing with the result[1] and providing relief, even though the decree of the court may not be aimed directly at the legislators themselves.

As Federal District Judge Miller said, the Appellees do not deny "the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution" (Jurisdictional Statement, p. 49). The three-judge District Court found that "the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs. . . ." (Jurisdictional Statement, p. 32).

Absent any substantial showing to the contrary, and there has been none, this Court is bound to accept this finding of the District Court.

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[1] *Cooper* v. *Aaron*, 358 U.S. 1.

II

THE COURT HAS AUTHORITY TO GRANT RELIEF WHERE THE DEPRIVATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS ARE INVOLVED, AND SUCH RELIEF IS ESSENTIAL IN THE CASE.

Notwithstanding Appellees' present assertion that this case affects the people of Tennessee as a polity (Statement in Op., p. 21), the District Court below made clear, as already indicated, that we are here dealing with the deprivation of individual rights. Therefore, cases such as *Nixon* v. *Herndon*, 273 U.S. 536, *United States* v. *Classic*, 313 U.S. 299, *Smith* v. *Allwright*, 321 U.S. 649, and *Terry* v. *Adams*, 345 U.S. 461, are useful precedents, since they represent vindication of individual voting rights which were diluted in one manner or another.

Appellees argue that if vindication of individual rights is permitted in this case, it will result in the destruction of the state government (Statement In Op., p. 23). This is patently not so. We have pointed out that even if the Court chooses to accept the reasoning in *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S. W. 2d. 40 (1956), *appeal dismissed* 352 U.S. 920 (that the state legislature could not function in a *de facto* capacity to make the necessary corrections if a court were to directly invalidate the 1901 Act of Apportionment), there are remedies which avoid encountering the alleged difficulties envisioned in the *Kidd* case, *supra*.

In the recently decided New Jersey Supreme Court decision,[2] which adopted the reasonable course of action already advocated by Appellants in this case (Juris-

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[2] Decided 10 days after the filing of Appellants' Jurisdictional Statement.

dictional Statement, page 25) for curing a similar wrong, the Court said regarding the destruction of government argument:

> "There is no doubt, as we have stated, that it is within the competence of the judiciary to adjudge a reapportionment act violative of the Constitution. Some of the defendants suggest that to do so would be to create chaos or anarchy, because no matter how long the filing of our mandate was withheld to permit the enactment of a curative law, the state government would be completely disrupted if the Legislature did not act within that time. Although we agree that if the 1941 Act has become unconstitutional, resort could not be had to an apportionment act of an earlier vintage because any such measure would also be invalid by the same test, we do not believe that the allegedly feared revolt would ever come about. A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature."
>
> *Asbury Park Press, Inc.* v. *Woolley*, decided June 6, 1960, by the Supreme Court of New Jersey, p. 11.

The history in cases where courts have assumed jurisdiction bears out the view of the New Jersey Supreme Court that the judicial call to duty has evoked a proper legislative response and has not resulted in the destruc-

tion of any state government (Jurisdictional Statement, p. 23).

The Attorney General of Tennessee urges that the injured voters should be left to secure state legislatures that will apportion properly (Statement in Op., p. 25). We have pointed out that the voters of Tennessee, particularly the complaining voters and those similarly situated, have historically been shut off from obtaining a legislature which would correct the abuse, and that only by the assumption of judicial jurisdiction can the corrective processes be set in motion (Jurisdictional Statement, pp. 17-18).

III

THE PREVIOUS DECISIONS OF THIS COURT HAVE NOT DECIDED AGAINST THE RELIEF REQUESTED IN THIS CASE AND THE CIVIL RIGHTS ACT AMENDMENT SUPPORTS IT.

The Attorney General of Tennessee attempts to establish that a group of cases beginning with *Colegrove* v. *Green*, 328 U.S. 549, is precedent for judicial inaction now. The case before the Court is distinguishable from these cases.

In *Colegrove* v. *Green, supra*, there was no declared policy of representation or equal voting in the state constitution, and this Court did not pass upon a state statute which deliberately deviated from that policy to give certain citizens only a part vote and other citizens a full vote. In *McDougal* v. *Green*, 335 U.S. 281, which, like the *Colegrove* case, arose in Illinois where there was no declared state constitutional policy, the Court held that it was allowable to require that candidates for statewide offices should have support which was not limited to a concentrated locality.

In *South* v. *Peters*, 339 U.S. 276, which challenged

the Georgia county unit system, there was the same absence of a declared state policy in the state constitution.

In cases such as *Bonney* v. *Smith*, 342 U.S. 916, the suggestion of the existance of possible alternative remedies appears to have been determinative.

In cases such as *Turman* v. *Duckworth*, 329 U.S. 675, and *Hartsfield* v. *Sloan*, 357 U.S. 916, this Court merely entered *per curiam* orders relying on the earlier cases, which are distinguishable, without discussing the merits.

Kidd v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d 40 (1956), *appeal dismissed*, 352 U.S. 920, cannot be determinative of the issues presented in this appeal. The decision there was that a declaratory judgment, which would invalidate the Tennessee Act of 1901, could not be entered because it would have the effect of eliminating the state legislature *de facto* as well as *de lege*, and would leave no legislative body to carry on, for the corrective and other purposes. Thus, the merits of the federal questions now raised by this case were not considered. In fact, in the case at bar, while the three-judge federal District Court treated *Kidd* v. *McCanless*, *supra*, as one of the cases which appeared to create a problem in the granting of relief, nevertheless, the Court made its own finding on the denial of federally guaranteed rights saying:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay."
>
> (Jurisdictional Statement, p. 32).

On the question of relief, Appellants suggested in their Jurisdictional Statement that with the added impetus of 28 U.S.C. § 1343(4), federal courts are no longer justified in refusing to exercise equity jurisdiction as in *Giles* v. *Harris*, 189 U.S. 475, and in *South* v. *Peters*, 339 U.S. 276 (Jurisdictional Statement, p. 22). The Attorney General of Tennessee has construed this suggestion to mean that Appellants must rely solely on this 1957 amendment to the Civil Rights Act to support any right to relief (Statement in Op., p. 9).

This is obviously inaccurate. Appellants set forth clearly authoritative precedents for this Court to exercise equity jurisdiction to grant the needed relief, e.g. *Smiley* v. *Holm*, 285 U.S. 355, *Snowden* v. *Hughes*, 321 U.S. 1 (Jurisdictional Statement, pp. 20-22). Moreover, it is fundamental law that a suit for equitable relief from an unconstitutional act can be based directly upon the federal constitution, *Ex Parte Young*, 209 U.S. 123; *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579.

The injured voters are not urging the creation of any new rights as the Attorney General of Tennessee would impute to them. On the contrary, they have relied (among other things) upon 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), which long ago established redress, including equitable relief, in the federal courts for deprivation under color of state law of federally guaranteed rights, including voting rights,[3] and which more

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[3] *Nixon* v. *Herndon*, 273 U.S. 536.
Smith v. *Allwright*, 321 U.S. 649.
Terry v. *Adams*, 345 U.S. 461.
Rice v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied 333 U.S. 875.
Dyer v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956).
Magraw v. *Donovan*, 163 F. Supp. 184 (D. Minn. 1958).

recently have been bolstered specifically by the added paragraph (4) in § 1343, enacted as a separate title in 1957.

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INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers is an organization composed of over 1200 municipalities located in each of the 50 states, and the District of Columbia. Each member city acts through its chief legal officer known either as a City Attorney, Director of Law, Corporation Counsel or by a similar title.

This Brief is filed pursuant to Rule 42(4) of the Rules of this Court. The members of the National Institute of Municipal Law Officers are political subdivisions of states, and this Brief is sponsored by their authorized law officers.

The issues presented in this case vitally affect all of the municipalities in the United States. Only by means of an equal vote in state elections can residents of these

municipalities assert the needs and the interests of modern, urban communities. Only by means of equal representation in state legislatures can these cities meet the challenges now before them. Because the instant case, if reviewed and reversed, would provide that equality in Tennessee, the National Institute of Municipal Law Officers has filed this *Amici* brief.

With all other avenues of relief exhausted and closed, the member cities of the National Institute of Municipal Law Officers strongly urge the Court to take jurisdiction of this case, and to decide the great national issue here presented. It is an issue of transcendent importance to all Americans.

ARGUMENT

Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs,[1] political representation in the majority of state legislatures is 50 or more years behind the times.[2] Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population.[3] These demands will become

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[1] NIMLO L. Rev., Vol. 20, 82 (1957).

[2] *Ibid.* See also Council of State Governments, Book of the States, Vol. XII, 55 (1958).

[3] In 1947, residents of urban areas made up 59% of the United States population but elected only about 25% of the state legislators of the country. United States Conference of Mayors, *Government Of The People, By The People, For The People!* (1947).

even greater by 1970 when some 150 million people will be living in urban areas.[4]

The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administraters.

Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states.[5]

In New York City, for example, 8 million people elect only 90 members of the state assembly while 7 million "upstaters" have 118 representatives.[6] Los Angeles County with a population of 4,151,687 has but one senator while the counties of Inyo, Mono, and Alpine, California with a total of 14,014 residents have the same representation.[7] Baltimore is limited to 6 state

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[4] United States Municipal News, Vol. 27, No. 9, May 20, 1960. The 1960 Census will show that of the 180 million population, well over 100 million live in cities, O'Hallaren, *A Fair Share For the Cities*, Reporter Magazine, November 12, 1959, Vol. XXI, 22-24.

[5] Lewis, *Legislative Apportionment and the Federal Court*, 71 Harv. L. Rev. 1057 (1958).

[6] Strout, *The Next Election is Already Rigged*, Harper's Magazine, November, 1959, Vol. 219, 37.

[7] *Ibid.* See also McHenry, *Urban v. Rural in California*, 35 National Municipal Rev. 350, 352 (1946); *Hearings Before the Subcommittee, Committee on Government Operations*, 85 Cong., 1st Sess., at 1165 (1959).

senators regardless of the size of its population, as is Philadelphia, which is also allowed only 6 senators, and Providence, Rhode Island, which may only elect one-fourth of the total number of state senators.[8] Portland, Oregon, which by 1950 had grown 230% in population since a 1910 reapportionment, has not as yet received a single additional state senator.[9] 175,000 persons in Dallas and Houston, Texas have about one representative in the state legislature while in the smaller counties of the state, 30,000 people have the same representation.[10]

Nor is the lack of urban representation confined only to larger municipalities in the United States. Although Burlington, Vermont contains 33,000 persons, it has one representative in the state senate, while the little town of Victory with a population of 48 also has one state senator.[11] Because Vermont is now operating under a system of apportionment set up 167 years ago,[12] one rural vote is equal to 600 city votes. In Connecticut, which allows each town one representative in the state house and towns of over 5,000 persons, two representatives, the largest city, Hartford (with a population of 156,000) receives the same representation as Colebrook, which has 547 persons, and Union which has 261

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[8] Law and Contemporary Problems, *Legislative Reapportionment*, Vol. 17, No. 2, 370-371 (1952).

[9] Council of State Governments, Book of the States, Vol. XII, 55 (1958): Neuberger, *Our Rotten-Borough Legislatures*, 86 Survey 53 (1950).

[10] Letter from H. P. Kucera, City Attorney of Dallas, Texas to the National Institute of Municipal Law Officers, June 14, 1960.

[11] *Op. cit., supra*, note 6, Strout, *The Next Election is Already Rigged* at 85.

[12] Council of State Governments, Book of the States, Vol. XII, 55 (1958).

residents.[13] The Connecticut House of Representatives was last reapportioned in 1818.[14]

Entirely too typical of the general state voting situation is Kansas, where half of the population lives in eight urban counties, which are represented by 8 senators and 17 representatives, while the other half of the state's population receives 32 senators and 108 representatives. The malapportionment in Michigan is also indicative. There, the largest senatorical district according to the 1950 census had 396,001 people while the smallest contained only 61,008, yet each district has a single senator.[15]

Because of such under-representation, municipal development is severely hobbled, and the pressing urgency

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[13] *Op. cit., supra*, note 8, Law and Contemporary Problems, *Legislative Reapportionment* at 371; Editorial *Down-Trodden Majority*, New Republic Magazine, Vol. 141: 3-4, November 9, 1959. See also MacNeil, *Urban Representation in State Legislatures*, 18 State Government 59 (1945) where it is noted that discrimination was found in 31% of the 42 states studied, and only 17 cities out of the 67 cities studied were represented in proportion to their population.

[14] *Ibid.*, Law and Contemporary Problems, *Legislative Reapportionment*.

[15] Because of a 1952 amendment to the Michigan Constitution, there are now glaring variances in the ratio of population of the smallest Senatorial district to the other more heavily populated districts, some of which are as follows:

District	Population in 1950	Ratio of District to Smallest District
13	270,963	4.5 to 1
18	333,498	5.5 to 1
21	352,980	5.8 to 1
4	364,026	6.0 to 1
12	396,001	6.5 to 1

Source: *Scholle* v. *Hare, et al.*, unreported decision of Michigan Supreme Court, decided June 6, 1960, Plaintiff's Exhibit G, Pt. 1.

now for cities and suburbs to fully provide for the needs of their hundreds of thousands of residents cannot be satisfied. The full effect of existing state legislative apportionment becomes apparent when one examines the manner in which state funds are often distributed to urban communities.

The grossly unfair distribution of tax benefits in Tennessee, as described in the Appellants' Jurisdictional Statement, is by no means unusual. In Colorado, the legislature doles out to the City of Denver a mere $2.3 million per year in school aid which must provide facilities and services for 90,000 children. By contrast, Jefferson County, Colorado, which is a semi-rural area gets $2.4 million for 18,000 pupils.[16]

Similarly in Pennsylvania, the legislature pays $8 a day for the care of indigent persons to all non-sectarian hospitals in the state with the exception of the city-owned Philadelphia General Hospital which has to provide such services at a yearly cost of $2.5 million.[17] Philadelphia also spends $26 million a year on its city highways, yet it receives only a $2 million apportionment from state taxes of which it contributed over $20 million.[18] San Francisco receives considerably less for its schools than do its neighboring counties, and therefore city taxpayers provide for the education of chil-

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[16] *Op. cit., supra*, note 6, Strout, "The Next Election is Already Rigged" at 37.

[17] *Ibid.* See also Municipalities and the Law in Action (1946 ed.) 96.

[18] Statement of Mayor Richardson Dilworth, *Hearings before the Subcommittee of the House, Committee on Government Operations*, 85th Cong., 1st Sess., at 352 (1958) in which Mayor Dilworth also noted at 337 that until a redistricting of "rotten boroughs" occurred, the cities will continue to face the inability of the states to cope with the manifold problems of metropolitan areas."

dren in other school districts throughout the state."[19]

Thus, in spite of the fact that city and suburban dwellers outnumber the citizens of rural communities, the rural voters, nevertheless, are overwhelmingly in control of state legislatures so that conservative thinking dominates the state legislative atmosphere and the state treasuries.[20] It is impossible for municipal administrators, therefore, to effectively cope with such staggering problems as slum clearance, the need for new schools, or urban development in this unfair and frustrating atmosphere.

Nearly every state constitution on its face provides for the periodic apportionment of state legislative seats on the basis of population.[21] Disregard for such constitutional commands is shocking to any observer, yet the majority of state legislators blandly ignore any pleas for reapportionment—just as the Tennessee legislature has in the instant case—because of the obvious loss of rural power which would accompany an equitable distribution of representation. This is so even though millions of urban residents are daily deprived of the representation which they deserve and which their circumstances clearly require.

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[19] *Hearings Before the Subcommittee, Committee on Government Operations*, 85th Cong., 1st Sess., at 1161 (1959).

[20] As graphically stated by Mayor Ben West of Nashville, Tennessee, "the State is being ruled by the hog lot and the cow pasture." NIMLO L. Rev., Vol. 20, 83 (1957). The City of Portland, Maine has received little or no consideration from the state legislature when it has attempted to sponsor legislation. Letter from Barnett I. Shur, Corporation Counsel of Portland, Maine to the National Institute of Municipal Law Officers, June 13, 1960.

[21] Council of State Governments, Book of the States, Vol. XII, 52-56 (1958).

The nature of the wrong suffered by the aggrieved Tennessee voters in this appeal was singled out recently by the Supreme Court of New Jersey, which made the following observation:

> "The legally qualified voters of the several counties are given the right under the Constitution to vote for all officers that are elective by the people. *N. J. Const., Art. 2, par. 3.* Assemblymen are such officers, and each voter of each county is entitled to cast his ballot for the number of them which the absolute mandate of Article IV, Section III *supra,* requires to be allocated to his county. Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State, according to the prescription of the organic law. To the extent that his county is given a lesser number of members in the lower House than are its due, his vote diminishes in value, and thus he does not receive the full measure of protection and representation which are of the essence of democracy. No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our Constitution that right is absolute. It is one of which he cannot be deprived, either deliberately or by inaction on the part of a legislature. Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against

> the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution."
>
> *Asbury Park Press, Inc.* v. *Woolley*, decided June 6, 1960, Appendix A. *infra*, at 17.

The National Institute of Municipal Law Officers submits that further deprivation of rights suffered by the Appellant voters in Tennessee, as well as by urban voters throughout the United States, can be prevented by action of this Court. As pointed out in the Appellants' Jurisdictional Statement, this Court has in the past, and can now deal with the type of voting discrimination presented in this case.

CONCLUSION

It is therefore respectfully urged that the Court accept jurisdiction of this case, and decide it on its merits. We have no doubt whatsoever that such consideration would end the gross discrimination herein complained of.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM 1959

A-101

Received June 22, 1960

ASBURY PARK PRESS, INC., et al., Plaintiffs-Appellants,

vs.

J. RUSSELL WOOLLEY, County Clerk of the County of Monmouth, et al., Defendants-Respondents.

Argued March 22, 1960. Decided June 6, 1960.

Mr. William Novogrod argued the cause for plaintiffs-appellants.
(*Messrs. Goldstein and Novogrod*, attorneys; *Mr. William Miller*, of counsel and on the brief.)

Mr. Lawrence A. Carton, Jr., argued the cause for defendant-respondent, J. Russell Woolley, County Clerk of Monmouth County.
(*Messrs. Roberts, Pillsbury & Carton*, attorneys; *Mr. William E. Russell*, on the brief.)

Mr. Nicholas T. Fernicola argued the cause for defendant-respondent, Anthony Giuliano, County Clerk of Essex County.
(*Mr. George H. Callahan*, of counsel.)

Mr. Jacob Friedland argued the cause for defendant-respondent, Edward J. Borrone, Hudson County Clerk.
(*Mr. William F. Kelly, Jr.*, Hudson County Counsel.)

Mr. Theodore I. Botter, Deputy Attorney General, argued the cause for defendant-respondent, Edward J. Patten, Secretary of State.
(*Mr. David D. Furman*, Attorney General of New Jersey, attorney.)

The opinion of the Court was delivered by FRANCIS, J.

Plaintiffs are citizens and taxpayers of this State and have their residence in the County of Monmouth. In this action they seek a declaration (1) that the 1941 General

Assembly Apportionment Act, *L.* 1941, *c.* 310, *N.J.S.* 52:10-1, is violative of Article IV, Section III, paragraph I, of the 1947 Constitution, and (2) that the County of Monmouth is entitled to elect three members of the General Assembly rather than the two allotted by the 1941 Act. The complaint refers to the fact that in every year in which members of the General Assembly are to be elected, the defendant Secretary of State under *N.J.S.* 19:12-1 is obliged to direct and cause to be delivered to the clerk of the county and to the county board of elections wherein any such election is to be held, a notice stating that such officers are to be elected. It is alleged further that upon receipt of the notice the defendant county clerks have the duty, by virtue of *N.J.S.* 19:12-3, to cause a copy thereof certified to be true and correct to be delivered to the clerk of each municipality in the county not later than the fiftieth day preceding the primary election for the general election. By way of ancillary relief, plaintiffs pray for the issuance of an injunction restraining the Secretary of State and the named county clerks from issuing, delivering and acting upon the notice of election.

The trial court dismissed the complaint on the ground that decision as to need for reapportionment as well as the formula to be applied in the event of reapportionment is committed by the Constitution exclusively to the legislative branch of the government. The matter is before us on our own certification.

Article IV, Section III, paragraph I, of the 1947 Constitution provides, in much the same form as did the Constitution of 1844:

> "The General Assembly shall be composed of members elected biennially by the legally qualified voters of the counties, respectively, for terms beginning at noon of the second Tuesday in January next following their election and ending at noon of the second Tuesday in January two years thereafter. *The members of the General Assembly shall be apportioned among the several counties as nearly as may be according to the number of their inhabitants, but each county shall at all times be entitled to one member and the whole number of members shall never exceed sixty.* The present apportionment shall continue until the next census of the United States shall have been taken.

> Apportionment of the members of the General Assembly *shall be made by the Legislature at the first session after the next and every subsequent census,* and each apportionment when made shall remain unaltered until the following census shall have been taken." (Emphasis added.)

Subsequent to the 1940 census and on the basis of the number of inhabitants of each county disclosed thereby, the Legislature, by chapter 310, *L.* 1941, reapportioned the Assembly membership as follows:

> Atlantic county, two members;
> Bergen county, six members;
> Burlington county, one member;
> Camden county, three members;
> Cape May county, one member;
> Cumberland county, one member;
> Essex county, twelve members;
> Gloucester county, one member;
> Hudson county, nine members;
> Hunterdon county, one member;
> Mercer county, three members;
> Middlesex county, three members;
> Monmouth county, two members;
> Morris county, two members;
> Ocean county, one member;
> Passaic county, four members;
> Salem county, one member;
> Somerset county, one member;
> Sussex county, one member;
> Union county, four members;
> Warren county, one member.

The 1950 census of New Jersey was certified by the United States Bureau of the Census on February 5, 1952, and was filed by the Governor with the Secretary of State on February 11, 1952. Despite the revelation from the figures that substantial relative changes in the population of various counties had occurred since 1940, during the succeeding eight years the Legislature failed to heed the Constitutional mandate that the Assembly shall be apportioned "at the first session" after the census. Although many bills have been introduced for the purpose, the 1941

Act still controls the number of assemblymen to be elected from each county. As has been indicated, the imperative language of the present Constitution appears in substantially the same form as that of 1844, and the parties are in agreement that for the first time in the intervening 100 years there has been a failure to discharge the duty to apportion after each census. See, *New Jersey Legislative Reapportionment* (Nov. 1957), prepared and published by the Law and Legislative Reference Bureau, Division of the State Library, Archives and History.

Plaintiffs do not claim that the 1941 Act was invalid at the time of adoption. They contend, however, that the 1950 census shows such a change in the number of inhabitants in the various counties that a different distribution of Assembly seats, some counties being entitled to more and some less than presently specified, is required by the Constitution. And they urge that these changes, considered in the light of the Constitutional mandate, have caused the 1941 legislation to become invalid. *Cf. Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U.S. 405, 415, 79 L. Ed. 949, 55 Sup. Ct. 486 (1935); *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564 (1944), *appeal dis. and cert. den.* 332 U.S. 717, 88 L. Ed. 1558, 64 Sup. Ct. 1288 (1943).

Effectuation of the prescription for allocation of seats among the counties "as nearly as may be" according to the number of their inhabitants, with the maximum number of seats fixed at 60, requires mathematical calculations. If the total population of the State, as shown by the 1950 census, were devided by 60 and the quotient could be divided evenly into the population of each county, the task would be simple. Unfortunately such a perfect result is unlikely, and so the Legislature has the difficult task of distributing whole seats to the extent indicated by the population division (subject to the order of the organic law that each county must have at least one seat) and then allocating the balance in accordance with some treatment of the remaining fractions which will conform with the "as nearly as may" apportionment mandate.

The record and the briefs indicate that there are five well known modern mathematical formulas which may be used. They are:

1. Method of smallest divisors.
2. Method of the harmonic mean.

3. Method of equal proportions.
4. Method of major fractions.
5. Method of greatest divisors.

Report of the National Academy of Science to the Speaker of the House of Representatives, February 4, 1929 (entered in Congressional Record, 70th Congress, 2nd Session, Vol. 70, Part 5, pp. 4966, 4967); *Report Upon the Reapportionment of Representatives by the Advisory Committee to the Director of the Census*, submitted to the Senate Committee on Census, 1921 (entered in Congressional Record, 69th Congress, 1st Session, Vol. 67, Part 7, pp. 7078, 7080); *Huntington, Methods of Apportionment in Congress*, 1940 (Senate Document No. 304, 76th Congress, 3rd Session, 1940); *Schmeckebier, Congressional Apportionment, The Brookings Institution*, 1941; *Report of Committee on Apportionment of the American Political Science Association*, 1950 (reprinted in The American Political Science Review, Vol. 45, No. 1, Mar. 1951, pp. 153-157; *New Jersey Legislative Reapportionment, supra*, pp. 11-12; and see *Shaw v. Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941). Informed students of these formulas speak of some of them as favoring the larger counties or states, while others favor the smaller ones. One formula, the method of equal proportions, seems generally to be regarded as producing the smallest relative differences in population per assemblyman and the smallest relative difference in the individual share in an assemblyman. *Report of the National Academy of Sciences, supra; Huntington, Methods of Apportionment, supra.*

Explanation or illustration of the way these different methods of apportionment operate is not necessary for purposes of this opinion. It is sufficient at this time to point out that if all five tests are applied to the population of the various counties as shown by the 1950 census, the common result is that at least one county is over-represented by a minimum of one too many assemblymen, while another county is under-represented by one too few assemblymen. Indeed, employment of the Vinton and Arithmetical Elimination Process, two other mathematical formulas which have been used in the past in this State and elsewhere, but which do not presently appear to be regarded as efficient as the so-called modern types, produces the same result. Other disparities revealed by all of the tests

mentioned likewise derogate from the adequacy of the existing apportionment. All of the evidence disclosed by the record is strongly suggestive of the conclusion that the distribution of assembly seats prescribed by the 1941 Act in the light of the 1950 census no longer satisfies the constitutional command for apportionment among the several counties "as nearly as may be" according to the number of their inhabitants. But in view of the conclusion reached as to the disposition of the case, to be expressed later, actual determination of the issue is reserved for the present.

A principal argument advanced by some of the defendants in opposition to a decision in the matter is that the Court has no jurisdiction to entertain the action. Support for the contention is said to reside in Article III, paragraph I, of the Constitution which divides the government into three distinct branches, legislative, executive and judicial, and specifies that no one branch shall exercise any of the powers properly belonging to either of the others. Therefore, say the defendants, since apportionment of the General Assembly is committed by the Constitution, Article IV, Section III, paragraph I, to the legislative department, and is essentially a political problem, the complaint presents no justiciable controversy which is within the competence of the judiciary to decide.

At the outset it must be noted that judicial intervention is not sought by way of mandamus to compel the Legislature to apportion conformably to the 1950 census, or to do so by means of any particular formula. As has been indicated, the relief sought is twofold: a declaratory judgment that the 1941 apportionment law is now unconstitutional because of that census, and a restraint which will prevent the holding of a primary or general election for members of the Assembly under that law.

The jurisdictional objection is without merit. It has long been settled in this State that adjudication of problems such as the present one is not only within the ambit of the constitutional authority of the courts, but represents one of their duties as well. *Wilentz* v. *Stanger*, 129 N.J.L. 606 (E. & A. 1943); *Botti* v. *McGovern*, 97 N.J.L. 353 (Sup. Ct. 1922); *Smith* v. *Baker*, 73 N.J.L. 328 (Sup. Ct. 1906), *aff'd p.c.* 74 N.J.L. 591 (E. & A. 1906); *State* v. *Wrightson*, 56 N.J.L. 126 (Sup. Ct. 1893).

The legally qualified voters of the several counties are given the right under the Constitution to vote for all officers that are elective by the people. *N.J. Const., Art.* 2, *par* 3. Assemblymen are such officers, and each voter of each county is entitled to cast his ballot for the number of them which the absolute mandate of Article IV, Section III *supra*, requires to be allocated to his county. Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State, according to the prescription of the organic law. To the extent that his county is given a lesser number of members in the lower House than are its due, his vote diminishes in value, and thus he does not receive the full measure of protection and representation which are of the essence of democracy. No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our Constitution that right is absolute. It is one of which he cannot be deprived, either deliberately or by inaction on the part of a legislature. Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. *Cf. United States* v. *Raines*, U.S. , 4 L. Ed.2d 524, 532, Sup. Ct. (Feb. 29, 1960); *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 98 L. Ed. 873, 74 Sup. Ct. 686 (1954); *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 525-532, 83 L. Ed. 1423, 59 Sup. Ct. 954 (1939); *Smiley* v. *Holm*, 285 U.S. 355, 76 L. Ed. 795, 52 Sup. Ct. 397 (1932); *Magraw* v. *Donovan*, 159 F. Supp. 901 (D.C. Minn. 1958); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D.C. Hawaii 1956), *reversed on other grounds* 256 F.2d 728 (9th Cir. 1958). As the Supreme Court of Kentucky declared in *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W.2d 315, 321 (1931):

> "Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of

the people, the control of the public purse from which the money of the taxpayers is distributed, and the power to make and measure the levy of taxes, are so essential, all-inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free, and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself."

Colegrove v. *Green*, 328 U.S. 549, 90 L. Ed. 1432, 66 Sup. Ct. 1198 (1946), is not to the contrary, for there no mandatory requirement of a state constitution for apportionment was involved.

The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people. In this sphere of activity the courts recognize that they have no power to overturn a law adopted by the legislature within its constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such case lies with the people. But when legislative action exceeds the boundaries of the authority delegated by the Constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it. *State* v. *Wrightson*, *supra* at 209. The authority and the duty to act when our jurisdiction is invoked in cases like the present, in the words of Chief Justice Beasley in *State* v. *Rodgers*, 56 N.J.L. 480, 615 (Sup. Ct. 1894), is "so entirely established as not to be debatable." And as the present Chief Justice said in *Ridgefield Park* v. *Bergen Co. Bd. of Taxation*, 31 N.J. 420, 426 (1960), when it is regularly invoked we cannot "properly look the other way."

Recognition of this judicial burden is not peculiar to New Jersey. The responsibility has been accepted in nu-

merous other jurisdictions. See *Magraw* v. *Donovan, supra; Dyer* v. *Kazuhisa Abe, supra; Shaw* v. *Adkins, supra; Armstrong* v. *Mitten*, 95 Colo. 425, 37 P.2d 757 (1934); *Moran* v. *Bowley*, 347 Ill. 148, 179 N.E. 526 (1932); *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980 (1904); *Denney* v. *State*, 144 Ind. 503, 42 N.E. 929 (1896); *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836 (1892), *rehearing den.* 33 N.E. 119 (1893); *Stiglitz* v. *Schardien, supra; Ragland* v. *Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N.E. 562 (1926); *Donovan* v. *Suffolk County Apportionment Com'rs*, 225 Mass. 55, 113 N.E. 740 (1916); *Attorney General* v. *Suffolk County Apportionment Com'rs*, 224 Mass. 598, 113 N.E. 581 (1916); *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906); *Board of Sup'rs* v. *Blacker*, 92 Mich. 638, 52 N.W. 951 (1892); *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944 (1892); *State* v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912); *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1 (1934); *In re Sherill*, 188 N.Y. 185, 81 N.E. 124 (1907); *People* v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827 (1893); *State* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892); *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). And see *Annotation*, 2 *A.L.R.* 1337. In fact, as the Supreme Court of Oklahoma said in *Jones* v. *Freeman, supra:*

> "It might be well to point out that in 1938, the courts of twenty-two states had exercised the power, or had stated that they had the power, to review legislative reapportionment acts upon constitutional grounds, and no court had denied that it possessed such power." 146 *P.2d* at 570.

From the foregoing it is manifest that the triunity of our government is not invaded by acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence.

One of the defendants argues that because eight years have elapsed since the 1950 census figures became available,

plaintiffs' action ought to be dismissed for laches. The point may be disposed of summarily. Acquiescence for no length of time can legalize a clear violation of duty where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it. *State* v. *Wrightson*, supra at 208. Thus we are brought to the more difficult question of the remedy available to a voter who is denied full representation in the Assembly because an apportionment act has become unconstitutional. Before considering this problem, it seems meet to reassert, as expressive of our own view, the observation of Chief Justice Beasley in *State* v. *Rodgers*, *supra*:

> "It will be understood that in this vindication of what is esteemed to be the undeniable prerogative of this court, there is not the slightest suggestion of the existence of a judicial capacity to control the legislative authority when exercised within its appropriate sphere. * * * All that is asserted is that when the inquiry is whether the legislature or any other body or officer has violated the regulations of the constitution, it is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government. Nor can we for a moment forget that, in entering upon the inquiry that is now imposed upon us as a duty, we have to do with a subject of great importance and delicacy, and that before the restraining power of this court can be exerted to interfere with the action of a co-ordinate branch of the state government, we must be as certain as care and diligence can make us that the foundation on which we place ourselves is sure and stable.
>
> "That this court has the legal right to entertain jurisdiction in the case displayed by this record (*i.e.*, the issue whether the Senate is a continuous body or one to be organized into life annually), we have no doubt, and we are further of opinion that it is scarcely possible to conceive of any crisis in public affairs that would more imperatively than the present one call for the intervention of such judicial authority." 56 *N.J.L.* at 616-617. (Insertion ours.)

Orientated accordingly, we turn to a discussion of possible forms of relief claimed to be open to plaintiffs.

It must be said at once that the courts cannot make the

reapportionment themselves. That duty is legislative in nature and is committed by the Constitution to the Legislature. *Jones* v. *Freeman, supra.*

There is no doubt, as we have stated, that it is within the competence of the judiciary to adjudge a reapportionment act violative of the Constitution. Some of the defendants suggest that to do so would be to create chaos or anarchy, because no matter how long the filing of our mandate was withheld to permit the enactment of a curative law, the state government would be completely disrupted if the Legislature did not act within that time. Although we agree that if the 1941 Act has become unconstitutional, resort could not be had to an apportionment act of an earlier vintage because any such measure would also be invalid by the same test, we do not believe that the allegedly feared result would ever come about. A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature.

Concrete examples of justification for such faith are available. The two *State* v. *Cunningham* cases, *supra*, reveal that on March 22, 1892, the Supreme Court of Wisconsin declared the existing apportionment act invalid. On July 2, 1892, a special legislative session passed a new act. It, too, was invalidated by the same court on October 7, 1892, but ten days later, at a second special session, another reapportionment was adopted, and that act validated the notices of election previously issued by the Secretary of State for the November 8, 1892 election.

In *Magraw* v. *Donovan, supra,* the Federal District Court declined to accept the contention that reapportionment was not a justiciable issue and convened a three-judge court to hear the merits of the matter. The three-judge court retained jurisdiction pending the 1959 session of the Minnesota Legislature, saying in a per curiam opinion:

> "Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. Minnesota Constitution, Article 4, Sections 2 and 23; Smith v. Holm, supra,

at page 490 of 220 Minn., 19 N.W.2d 914; State ex rel. Meighen v. Weatherhill, supra, page 341 of 125 Minn., 147 N.W. 105. Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been presented to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.' Smith v. Holm, supra, at page 490 of 220 Minn., at page 916 of 19 N.W.2d.

"*It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State.*

"The Court retains jurisdiction of this case. Following adjournment of the 61st Session of the Minnesota Legislature, the parties may, within 60 days thereafter, petition the Court for such action as they, or any of them, may deem appropriate." 163 *F. Supp.* at pages 187-188. (Emphasis added.)

Thereafter, at the 1959 session the Legislature enacted a new apportionment act as a result of which the litigation was dismissed. *Id.* 177 *F. Supp.* 803 (1959).

In *State* v. *Wrightson, supra,* a statute which required election of individual assemblymen by districts within the county rather than the total number of them apportioned to the county being elected by all the voters of the county, was declared offensive to the Constitution. The judgment was implemented by a mandamus directed to the county clerk of Essex County and to the municipal clerks of the county commanding "that all future elections for members of the general assembly * * * shall be so conducted that such members shall be voted for throughout the county." 56 *N.J.L.* at 215.

Courts of other jurisdictions have recognized the existence of their authority to issue a mandamus to election officials to hold an election for representatives in the Legislature under an earlier apportionment act because the current one was unconstitutional, and to issue an injunction restraining the use of the current one for election purposes, *Parker* v. *State, supra;* to declare an apportionment act invalid and to enjoin the Secretary of State from expending any public funds in carrying out its provisions, *Armstrong* v. *Mitten, supra;* to enjoin the clerk of the circuit court, sheriff and auditor of a county from proceeding to hold an election for state senators and representatives under an illegal apportionment law, and to issue a "writ of mandate" to conduct the election under an earlier act, *Denney* v. *State, supra; Brooks* v. *State, supra;* to enjoin the holding of a primary election, *Ragland* v. *Anderson, supra;* to enjoin the county clerk from preparing and furnishing ballots for the approaching primary, *Stiglitz* v. *Schardien, supra; Rogers* v. *Morgan, supra;* to grant mandamus compelling the Secretary of State to give notice of election of representatives from the county under the earlier act because the later one was void for gerrymandering, *Board of Sup'rs* v. *Blacker, supra;* or for improper apportionment, *Giddings* v. *Blacker, supra, Williams* v. *Secretary of State, supra;* and to restrain the Secretary of State from conducting an election under an unconstitutional apportionment act, *State* v. *Cunningham* (two cases), *supra.*

In the present proceeding two further possible remedies have been persuasively suggested. First, that the court may restrain the clerks of the various counties where over or under-representation exists from placing on the ballot at the primary election a clearly excessive or inadequate number of candidates for the Assembly according to the census figures. The second suggestion calls attention to the fact that the Constitution provides for a maximum of 60 seats in the Assembly with each county being entitled to at least one seat, but does not regulate the value of the *vote* of each Assemblyman. Plaintiffs then point out that when an apportionment act is invalid the constitutional mandate for allocation of assembly seats as nearly as may be according to the number of inhabitants of each county can be satisfied with mathematical accuracy by means of a court order limiting the value of the *votes* of the assemblymen allocated to a particular county by such act to the

exact fraction established by the relation of the population of that county to the population of the state. This formula (without attempting to compute the equation) might indicate, for example, that Essex County with 12 seats according to the 1941 Apportionment Act would be entitled to 10¼ votes, each assemblyman being possessed of 1/12th of that number. Establishment of a similar vote value for each county for the total of 60 votes would constitute (it is said) exact representation according to the Constitution. And in answer to the possible criticism that some of the partial votes in the counties would be in terms of large fractions, reference is made to the advance in the electronic arts which would permit easy and rapid computation, whatever the fractions might be.

Finally, plaintiffs argue that the phrase "as nearly as may be" requires as a matter of constitutional command the adoption of the formula for apportionment which comes closest to the mathematical ideal. As a means of describing this ideal, they refer to the statement in the *New Jersey Reapportionment Study, supra*, p. 12, that:

> "Since an exact apportionment is not possible [in terms of seats], that method which produces the smallest differences among the counties in population per assemblyman (or in individual share in each assemblyman) is the fairest method. If, in any reapportionment, these differences cannot be reduced by shifting one seat from any 1 county to any other county, the seats have been apportioned 'as nearly as may be'."

They urge that such a method must naturally be the most neutral one, *i.e.*, one which favors neither the larger nor the smaller counties in its application. And they contend that only one formula accomplishes that result, namely, the equal proportions method.

Study of the record has led us to the conclusion that no declaration should be made at this time with respect to the invalidity of the 1941 Apportionment Act or the particular remedy to be made available in the event of such a declaration. Eight years have passed without an attack on the apportionment in the courts. There will be no primary or general election of members of the General Assembly until 1961. The 1960 census has been taken and already some preliminary figures are making their appearance in the public press. Some of the parties have ex-

pressed the view that it would be impractical to undertake to reach any kind of a decision related as it would have to be at present to the 1950 census when, in a few months, a reappraisal would be necessary. The indications are that sufficiently reliable preliminary figures will be available in ample time prior to the next primary election. As counsel for one of the defendant counties properly observes, such preliminary statistics have been adjudged adequate for the purpose of meeting the provision for apportionment "as nearly as may be" according to the number of inhabitants of each county. *Cahill v. Leopold*, 141 Conn. 1, 103 A.2d 818 (1954). It may be noted that our Constitution requires reapportionment after the "following censuses shall have been taken." It does not say "taken and promulgated in final form." As the Connecticut Supreme Court of Errors said in the cited case:

> "* * * it is not necessary that the information be published in book form before it becomes officially available. Indeed, there is not even a constitutional provision requiring the figures to be final. While final tabulations tend to greater exactitude than those previously computed, there is no need for the precision of perfection. The results of the preliminary counts customarily released by the census bureau, as happened in the case at bar, are ample to afford sufficiently accurate data for an Assembly to proceed to redistrict in an intelligent manner, provided the counts have been broken down into counties, towns and wards." 103 *A.2d* at 823-824.

In this connection it is not without significance that at the 1947 Constitutional Convention a proposal to add "and promulgated" after the words "have been taken" of the pertinent clause of Article IV was rejected. *III Proceedings, Constitutional Convention of 1947*, page 765.

Population estimates of the Department of Conservation and Economic Development seem to plainly indicate that the 1960 census will portray a need for reapportionment of the Assembly more in terms of whole seat variations than did the 1950 figures. *New Jersey Population Estimates 1958* (Research Reports No. 116, March 1959).

Under the circumstances, it is to be presumed that the Legislature contemplates the performance of its constitutional duty to reapportion when the preliminary census

results become available. Moreover, our attention has been called to the introduction of bills designed to remove the burdensome task from the Legislature and transfer it to an agency which will not be subjected to the same political pressures in its performance. As Dean Fordham noted in 1957, ten states had adopted that course and in all of them reapportionment had taken place since 1950. *The State Legislative Institution, University of Pennsylvania Press* (1959), pp. 46-47. Three others have followed since then. *Lewis, Legislative Apportionment and the Federal Courts*, 71 *Harv. L. Rev.* 1057, 1089 (1958). In some of the states judicial review of apportionment is specifically authorized. See, *e.g.*, *Shaw* v. *Adkins*, *supra*, for an excellent court study of the result promulgated by such an independent board. It is worthy of mention also that under Article III, Section 5, of the New York Constitution:

> "An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same." 12 *Consolidated Laws Service* 63.

For the reasons stated, we shall withhold determination of the various problems presented (except, of course, that of our jurisdiction to hear the matter) in order that the Legislature may have an opportunity to consider adoption of a reapportionment act when the preliminary 1960 census data have been made available by the Federal authorities. In the meantime, the record will be held for the purpose of such further action as the parties deem advisable after such data have become available and within such reasonable time prior to the 1961 primary election as the circumstances may demand.

In the event that reactivation of the proceeding is sought, any additional evidence, and particularly such new computations as appear necessary, may be added to the record by the parties. Additional briefs should also be submitted containing any further arguments the parties desire to present and discussing the following:

(a) Does the language of the Constitution requiring apportionment "as nearly as may be" according to the number of inhabitants of each county circumscribe the discretion of the Legislature to the extent that as a matter of law the formula which is most neutral as between the smaller and larger counties and which, from a mathematical standpoint, most closely approaches the "as nearly as may be" mandate, must be employed?

(b) Are the limits of the "as nearly as may be" test sufficiently broad to permit, in the discretion of the Legislature, adoption of any recognized mathematical formula for apportionment, regardless of whether it in some measure favors the small over the large counties or vice versa?

(c) If reapportionment is not accomplished legislatively after the 1960 census figures become available (and assuming that (a) above is not applicable), does the Court have the constitutional authority

1) to allow the present allocation of assemblymen to the various counties to stand but to limit the value of their vote by counties according to the 1960 census? In this event, does the Constitution by implication preserve one vote as well as one seat to the counties which, on a population basis, would not be entitled to one seat?
2) to enjoin the election of the number of assemblymen in any county who palpably appear to constitute over-representation by reason of the 1960 census?
3) to order the inclusion on the ballot of such additional assemblymen as any county palpably appears entitled to under the mandate of the Constitution by reason of the 1960 census?

Jurisdiction of the cause is retained and decision on the merits is withheld for the purposes outlined. An appropriate order may be entered.

A True Copy.

JOHN H. GILDEA,
Clerk.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term [redacted] 1961

CHARLES W. BAKER, ET AL.,
Appellants

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF TENNESSEE

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

AND

BRIEF FOR MARVIN FORTNER, W. D. ALBERTS, J. K. MILNER, CLEVE ALLEN, JR., CARL STANTON AND SAM MAXWELL AS AMICI CURIAE

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IN THE,
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,

Appellants

v.

JOE C. CARR, ET AL.,

Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION OF SIX MISSISSIPPI TAXPAYERS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, Marvin Fortner, W. D. Alberts, J. K. Milner, Cleve Allen, Jr., Carl Stanton and Sam Maxwell ("Mississippi Taxpayers and Qualified Voters") respectfully move for leave to file as amici curiae a brief in the above entitled case and, in support of such Motion, make the following statement:

1. The above entitled case, (the "Tennessee Case"), involves the legality of a Tennessee legislative reapportionment Act (Sections 3-101—3-107 Tenn. Code Ann.), which Act, it is alleged, violates the Tennessee and Federal Constitutions, and particularly the equal protection clause of the Fourteenth amendment to the Federal Constitution and the Civil Rights Acts.

2. The six Mississippi taxpayers are complainants, on behalf of themselves and all other Mississippi taxpayers similarly situated, in a suit in equity against Ross R. Barnett, Governor of the State of Mississippi; Heber Ladner, Secretary of State of the State of Mississippi; Joe T. Patterson, Attorney General of the State of Mississippi; individually and as members of the Mississippi State Election Commission; and each of the County Election Commissioners of the 82 County Election Commissions in Mississippi, individually, as members of said commissions, and their successors in office, said suit now pending and at issue in the Chancery Court of Harrison County, Mississippi, Docket No. 43,076 (the "Mississippi Case"). In the Mississippi Case the complainants seek to enjoin, as violative of the Mississippi Constitution, the Federal Constitution and the Act of Congress of February 23, 1870, admitting the State of Mississippi to representation in Congress as one of the States of the Union, the election of Representatives and Senators to the Mississippi Legislature under the provisions of the present apportionment Act (Chapter 408 of the Mississippi Laws of 1956).

3. The Complaint in the Mississippi case alleges:

(a) That the present Mississippi Constitution of 1890 violates the basis of suffrage determined and required as a condition precedent in the Act of Congress admitting Mississippi to representation in Congress;

(b) That the present Mississippi Constitution and Legislative Acts thereunder violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution;

(c) That the Mississippi Constitution and legislative Acts thereunder violate the Federal Civil Rights Acts;

(d) That the complainants and other taxpayers and qualified electors of the State of Mississippi are deprived of a truly democratic and representative State Legislature as guaranteed by Section 4 of Article IV of the United States Constitution;

(e) That the present Mississippi Legislature consists of a number of representatives in excess of the constitutional maximum limitation and a number of senators in excess of the constitutional maximum limitation;

(f) That the Mississippi Constitution of 1890 creates and establishes a gerrymander, the result of which is to dilute the value of votes in certain geographical areas to an extent, for all practical purposes, tantamount to negation;

(g) That the present Mississippi Constitution of 1890 has, on numerous occasions, been altered and amended by the Legislature in the matter of legislative apportionment without submission to, or ratification by, the qualified electors;

(h) The present Mississippi Constitution of 1890 was never submitted to, nor ratified by, the qualified electors as required by the Mississippi Constitution of 1869; and

(i) That as a result of the failure of the Mississippi Legislature to reapportion itself periodically as contemplated by the Constitution, the qualified electors are deprived of representative political delegations to Party Conventions with consequent denial of equal rights in the nomination of party candidates for President and Vice-President of the United States, as well as the adoption of party platforms.

4. The Mississippi Case involves some issues in common with the Tennessee Case and the determination of this Court in the Tennessee Case may affect the outcome of the Mississippi Case.

5. The Mississippi taxpayers fully support the positions advanced by appellants in the Tennessee Case, but the facts with respect to the Tennessee legislative apportionment are different from those involved in the Mississippi Case, in that the present Mississippi Constitution of 1890 is itself under attack as being violative of a solemn treaty between the Federal Government and the State of Mississippi as the same pertains to suffrage. Moreover, in the Mississippi Case the Mississippi taxpayers complain of various and sundry constitutional alterations by Legislative Act without ratification by the qualified electors as required by the Mississippi Constitution.

6. The Mississippi taxpayers seek by a brief as amici curiae to present to this Court certain legal positions to the end that the judgment of this Court in the Tennessee Case (a) will be based upon positions which, if made applicable to similar issues in the Mississippi Case would not be prejudicial to the Mississippi taxpayers and (b) will not be based upon positions which might be inferentially dispositive of issues in the Mississippi Case which are not before the Court in the Tennessee Case.

7. While the parallel legislative failures to reapportion periodically for a period of sixty years, the constitutional mandates to the contrary notwithstanding, demonstrate a related interest in the subject matter, the Mississippi taxpayers believe that legal arguments will not be adequately presented by the parties touching upon the reapportionment issues peculiar to the Mississippi Case.

8. The appellants have consented to the filing of a brief by the Mississippi taxpayers as amici curiae but the appellees have refused consent.

9. The brief which the Mississippi taxpayers request to file as amici curiae accompanies this motion.

Respectfully submitted,

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Appellees

ON APPEAL FROM THE DISTRICT COURT
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MIDDLE DISTRICT OF TENNESSEE

BRIEF OF SIX MISSISSIPPI TAXPAYERS AND QUALIFIED VOTERS AS AMICI CURIAE

Marvin Fortner, W. D. Alberts, J. K. Milner, Cleve Allen, Jr., Carl Stanton and Sam Maxwell (Mississippi Taxpayers and Qualified Voters) file this brief, contingent upon the Court's granting the motion for Leave to File a Brief as Amici Curiae in the above appeal from a judgment of the District Court of the United States for the Middle District of Tennessee entered on February 5, 1960, granting a motion to dismiss filed in said cause by appellees.

INTEREST OF THE AMICI CURIAE

The Mississippi Taxpayers, who are qualified voters in the State of Mississippi, are complainants on behalf of themselves and other Mississippi taxpayers and qualified voters similarly situated, more than two thousand of whom have filed petitions to intervene as parties complainant, in a suit pending in the Chancery Court of Harrison County, Mississippi seeking to restrain the State and County Election Commissions from holding future elections to the Mississippi Legislature under Chapter 408 of the Mississippi Laws of 1956 as being violative of the State and Federal Constitutions, the Civil Rights Acts and the Act of Congress of February 23, 1870, admitting Mississippi to representation in the United States Congress.

As set forth in the Motion for Leave to File this Brief, the Mississippi taxpayers and qualified voters allege in their Complaint that numerous violations of both the Mississippi and Federal Constitutions deprive them and other citizens of equality in suffrage, and reference is here made to said Motion for additional details with respect to their interest in the above entitled case.

ARGUMENT

I

THE HISTORY OF REAPPORTIONMENT CASES

In reviewing the early cases involving the validity of state reapportionment statutes, we find, without exception, that where substantial disparity among the sizes of state legislative districts exists, the state courts have invalidated such acts on the ground that they conflict with the state constitution. Most of these cases involve apportionment statutes enacted shortly before the litigation was instituted. Relief, as in the instant case, was always sought against election officials. The following cases vividly illustrate the complete absence of difficulty the courts experienced in dealing with such a problem.

In *Board of Supervisors v. Blacker*, 92 Mich. 638, 52 N.W. 951 (1892) a writ of mandamus was granted against the Secretary of State who was ordered to conduct the election for members of the state legislature under the provisions of an earlier constitutional apportionment law.

In *Giddings v. Secretary of State,* 93 Mich. 1, 52 N.W. 944 (1892) a writ of mandamus was granted against the Secretary of State to restrain him from holding an election for members of the state legislature under an 1891 act and to compel him to hold it under an 1885 act; however, since the 1885 act was also found to be unconstitutional, the court ordered the election under the 1881 act unless the governor called a special session of the legislature in time to make a new apportionment.

In *State v. Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892), plaintiff brought a bill in equity to enjoin the Secretary of State from holding an election for members of the state legislature under an unconstitutional apportionment act. The court in holding the act invalid and enjoining the Secretary of State from conducting an election under it stated as follows at p. 729:

> "This apportionment act violates and destroys one of the most sacred rights and privileges of the people of this state, guaranteed to them by the Ordinance of 1787 and the Constitution, and that is 'equal representation in the legislature'."

In *Baird v. Board of Supervisors,* 138 N. Y. 95, 33 N.E. 827, (1893) a writ of mandamus was issued against the King's County Board of Supervisors ordering them to divide the county into legislative assembly districts of equal population. See also *Williams v. Secretary of State,* 145 Mich. 447, 108 N.W. 749 (1906); *Ragland v. Anderson,* 125 Ky. 141, 100 S.W. 865 (1907); cf. *Parker v. State,* 133 Ind. 178, 32 N.E. 836 (1892); *Denny v. State,* 144 Ind. 503, 42 N.E. 929 (1896).

The early cases involving judicial review of legislative apportionment statutes were all filed against election officials. Equitable relief was sought against such election officials restraining them from conducting the next election under the existing apportionment statute and directing them to hold the election under an earlier act which had presumably been repealed. The courts, without exception, not only entertained such actions and invalidated the later acts where substantial discrimination existed, but further they enjoined the election officials from holding elections under the invalid acts and directed that the election be held under the earlier act. Later cases have also reached this same result. *Stiglitz v. Schardien,* 239 Ky. 799, 40 N.W. 2d 315 (1931).

Following the 1910 and 1920 federal censuses, many of the state legislatures failed to reapportion their legislative seats despite the specific and often mandatory provisions of their state constitutions requiring such action. This presented the voter and taxpayer with a new problem, namely, silent gerrymandering which is gerrymandering resulting from a complete failure to reapportion despite large population shifts. The State of Illinois presented a classical example. The Illinois Constitution provided that "the general assembly shall reapportion" after every federal census. *Illinois Constitution, Article IV, Section* 6. However, after a failure of the general assembly to perform this duty following both the 1910 and 1920 censuses, a suit was filed in 1926 which attempted to secure a writ of mandamus directed at the individual members of the legislature ordering them to reapportion. Note that plaintiff did not seek to invalidate the existing act but sought to compel passage of a new act through the medium of a writ of mandamus. The court, however, denied the writ invoking the doctrine of separation of powers and holding that the duty to reapportion the state was specifically imposed by the Constitution solely upon the legislative department and that it alone was responsible to the people for a failure to perform that duty. *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926).

A second attempt was made in Illinois to force legislative action in the form of a suit to enjoin the state treasurer from paying the salaries and expenses of the legislators on the ground that failure to reapportion prevented the legislature from being a legally constituted body. This action also met the same fate as the previous mandamus action. *Fergus v. Kinney*, 333 Ill. 437, 164 N.E. 665 (1928). Following this a third attempt was made, namely a quo warranto action seeking to oust the derelict legislators from office on the ground that they had been elected under an unconstitutional act. This action met the same fate. *People ex rel Fergus v. Blackwell*, 342 Ill. 223, 173 N.E. 750 (1930). Next a convicted criminal sought unsuccessfully to have the statute under which he was convicted declared void on the ground that it was passed by a legislature elected under an invalid apportionment act. *People v. Clardy*, 334 Ill. 160, 165 N.E. 638 (1929). Finally an attempt was made to restrain the expenditure of public funds to carry on an election under an

allegedly invalid apportionment statute; this action also failed. *Daly v. Madison*, 378 Ill. 357, 38 N.E. 2d 160 (1941).

In these cases plaintiffs were confronted with an apportionment statute which was approximately fair when passed in 1901; however, due to shifts in population, the statute had become discriminatory. Apparently, because a different problem was presented than in the case of an act which was discriminatory when passed, plaintiffs employed a different and impossible remedy, and in so doing, invited the very result which followed. It is clear that the court should not grant a writ of mandamus running to the legislature requiring them to act. Moreover, a successful quo warranto action would result in leaving the state without any legislative body whatsoever, as would enjoining of the holding of an election on any basis for a new legislature. Further to declare all laws passed by an improperly apportioned legislature invalid would strike down appropriation laws among others, thus destroying the state government and producing a complete state of chaos.

The early equity cases filed against election officials clearly hold that the court can review and, if found discriminatory, invalidate a legislative apportionment statute. Moreover, the court can restrain the election officials from holding an election under the invalid act. No cases were found denying relief until, as a result of the failure of the legislatures to reapportion periodically, the plaintiffs sought writs of mandamus, quo warranto, or decrees invalidating all laws passed by the improperly apportioned legislature. The courts, unable to grant the relief requested, simply dismissed such proceedings. This resulted in an erroneous legal doctrine against judicial interference in legislative apportionment proceedings, arising not because apportionment statutes are judicially impregnable, but simply because the plaintiffs pursued an impossible remedy. Manifestly, where an efficacious remedy is sought, as in the case at bar, the cases last cited are not authority against appellants' position.

II

CONTENTION OF APPELLANTS CONCURRED IN BY COURT BELOW BUT REMEDY HELD LACKING

The appellants contend that the failure of the Tennessee Legislature to reapportion itself since 1901 violates their constitutional rights. The Court below held, inter alia:

> "With the Plaintiffs' (appellants here) argument that the Legislature of Tennessee is guilty of a clear violation of the State Constitution and the rights of the Plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay."

It would be useless consumption of the Court's time to here argue the equities involved in the case at bar or, for that matter, in any reapportionment case reaching the courts. Few would have the temerity or the audacity to seriously espouse a justification of legislative failure to reapportion. This Court, it may be assumed, is well aware of the malapportionment of State Legislatures throughout the Nation and the flagrant constitutional violations by State Legislatures with respect thereto. The question, therefore, resolves itself into one of remedy vel non. The power and authority of this tribunal to grant speedy and adequate remedial relief is unquestionable, and such relief is not without precedent. At least 44 cases[1] hold jurisdiction.

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[1] *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934)
Asbury Park Press v. *Woolley*, 161 A. 2d 705 (June 1960)
Atty. General v. *Suffolk County Commissioners*, 224 Mass. 598, 113 N.E. 581 (1916)
Baird v. *Kings County*, 142 N.Y. 523, 37 N.E. 619 (1894)
Barrett v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912)
Botti v. *McGovern*, 97 N.J.L. 353 (Sup. Ct. 1922)
Bowman v. *Dammann*, 209 Wis. 21, 243 N.W. 481 (1932)
Brooks v. *State ex rel Singer*, 162 Ind. 568, 70 N.E. 980 (1904)
Brophy v. *Suffolk County Apportionment Commissioners*, 225 Mass. 124, 113 N.E. 1040 (1916)
Colegrove v. *Green*, 328 U.S. 549 (1946)
Denny v. *State ex rel Basler*, 144 Ind. 503, 42 N.E. 929 (1896)
Donovan v. *Holtzman*, 8 Ill. 2d 87, 132 N.E. 2d 501 (1956)
Donovan v. *Suffolk County Commissioners*, 225 Mass. 55, 113 N.E. 740 (1916)
Dyer v. *Kazuhisa Abe*, 138 F. Supp. 220 (D.C. Hawaii, Three Judge Court, 1956)

The Court below further held:

"However, the remedies suggested by the Plaintiffs are neither feasible nor legally possible."

In the case of *McGraw vs. Donovan*, (Minn. 1958) 163 F. Supp. 184, the Federal District court in its courageous decision very effectively granted relief identical to that sought in the case at bar. Furthermore, the Federal District Court in the case of *Dyer vs. Kazuhisa Abe*, (D. Hawaii 1956) 138 F. Supp. 220, in another courageous decision, found it both feasible and legal to grant legislative reapportionment relief which proved most effective. Likewise, the New Jersey Supreme Court in the recent

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Fesler v. *Brayton*, 145 Ind. 71, 44 N.E. 37 (1896)
Giddings v. *Blacher*, 93 Mich. 1, 52 N.W. 944 (1892)
Heffernan v. *Carlock*, 198 Ill. 150, 65 N.E. 109 (1902)
Houghton County v. *Blacker*, 92 Mich. 638, 52 N.W. 951 (1982)
Jones v. *Freeman*. 193 Okla. 554, 146 P. 2d 564 (Appeal dismissed & cert. denied, 322 U.S. 717) (1943)
Magraw v. *Donovan*, 159 F. Supp. 901 (D.C. Minn. 1958) 163 F. Supp. 184 (D.C. Minn. Three Judge Ct. 1958)
Matter of Reynolds, 202 N.Y. 430, 96 N.E. 87 (1911)
Meighen v. *Weatherill*, 125 Minn. 336, 147 N.W. 105 (1914)
Merrill v. *Mitchell*, 257 Mass. 184, 153 N.E. 562 (1926)
Moran v. *Bowley*, 347 Ill. 148, 179 N.E. 526 (1932)
Opinion of the Justices, 18 Me. 458 (1842)
Parker v. *Powell*, 133 Ind. 178, 33 N.E. 119 (1892)
People ex rel Baird v. *Kings County*, 138 N.Y. 95, 33 N.E. 827 (1893)
People ex rel Woodyatt v. *Thompson*, 155 Ill. 451, 40 N.E. 307 (1895)
Preisler v. *Doherty*, 284 S.W. 2d 427 (Mo. 1955)
Prouty v. *Stover*, 11 Kan. 183 (1873)
Ragland v. *Anderson*, 125 Ky. 141, 100 S.W. 865 (1907)
Rogers v. *Morgan*, 127 Neb. 456, 256 N.W. 1 (1934)
Shaw v. *Adkins*, 202 Ark. 856, 153 S.W. 2d 415 (1941)
Sherrill v. *O'Brien*, 188 N.Y. 185, 81 N.E. 124 (1907)
Smith v. *Baker*, 74 N.J.L. 591 (Ct. of E & A, 1906)
Smith v. *Holm*, 220 Minn. 486, 19 N.W. 2d 914 (1945)
Smith v. *St. Lawrence County*, 148 N.Y. 187, 42 N.E. 592 (1896)
State ex rel Atty. Gen. v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892)
State ex rel Lamb v. *Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892)
State ex rel Winnie v. *Stoddard*, 25 Nev. 452, 62 Pac. 237(1900)
State v. *Wrightson*, 56 N.J.L. 126 (Sup. Ct. 1894)
Stiglitz v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931)
Sullivan v. *Schnitger*, 16 Wyo. 479, 95 Pac. 698 (1908)
Williams v. *Sec. of State*, 145 Mich. 447, 108 N.W. 749 (1906)

case of *Asbury Park Press vs. Woolley*, (1960) 161 A. 2d 705, in a most dynamic decision reversed the trial court and very effectively granted reapportionment relief. Therefore, with all deference, we submit, by way of proverb, "the proof of the pudding is in the eating." If the remedy proved feasible and legal in the three cases above cited there is no apparent reason why Tennessee should be an exception.

The court below then held:

> "The alternative of an election at large is met with a number of insuperable objections. First, the Constitution of Tennessee specifically provides for the election of members of the legislature from counties and districts, and no provision whatever is made for a legislature composed of members elected at large."

Again with utmost deference and respect we suggest that the Tennessee constitutional provision with reference to legislative reapportionment must be read and considered as a whole and that it requires an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties and districts according to the number of qualified voters. Therefore, if the full constitutional mandate had been followed this case would not now be before the Court.

The court below then holds:

> "Practical considerations also are heavily weighed against such a remedy. It would lead to serious geographical inequalities and other discriminations, probably to a greater extent than those presently existing."

With continuing deference to the trial court, we respectfully submit that the "practical considerations" would operate in exactly the reverse of the court's theory. In our humble judgment, it is inconceivable that any State Legislature, under a complete domination by rural over-represented counties, would ever permit an election of its membership from the State at large when it could prevent such an election simply by complying with their oaths of office in following the constitutional mandate to reapportion itself on a constitutionally prescribed basis. And that is the extent of the relief sought in the case before this Court as we view it.

The trial court's presumption of probability that an election from the State at large would lead to serious geographical inequities and other discriminations to a greater extent than those presently existing, we earnestly submit, is at most judicial speculation without support or basis. We suggest that it is far more logical to assume that a legislature elected by all of the qualified voters of the state would be more amenable to public demand than a legislature elected by a minority which the Court admits is guilty of a clear violation of the State Constitution, the evil of which, the Court says, is serious and should be corrected without delay. It would be naive, indeed, to suppose that State Legislatures are unaware of their duty respecting periodic reapportionment.

The appellants further contend, and we support their position, that the result of the failure to reapportion State Legislatures creates a condition violative of the Fourteenth Amendment to the United States Constitution and the Civil Rights Acts which, in the defense of human rights, must be presented and urged with all the force at our command.

III

RURAL MINORITY CONTROL VERSUS URBAN MAJORITY CONTROL

Without any thought or intention to reflect, in any way, discredit of any kind upon those fine and substantial citizens who dwell in our rural areas, nevertheless the gravamen of reapportionment cases arises as a controversy, at least to a large extent, between rural and urban areas. The rural areas, on the one hand, strongly oppose their displacement in the dominant political power acquired by them through inheritance and maintained by refusal of relinquishment, while the urban areas, on the other hand, seek equal representation as a fundamental and inherent right under a republican form of government. Equal representation is a right under the concept of democracy as guaranteed by the Constitution of the United States, and special favor is tenable neither as a divine nor political privilege. While it is true that nature, in her partiality, designates here and there an individual as the favored recipient of her special endowments, and ordains him to a particular sphere of eminence, it is rarely that she allocates such an array of special talents within

the confines of rural areas to the exclusion of urban areas, and on the whole it may be safely assumed that the destiny of the several states will be protected and preserved as well through equal representation as it will by dominant rural minority control. If we must concede preemption by rural minorities in the field of legislative representation, then under what conceivable theory can the advocates of democracy criticize totalitarianism, and most especially today when the whole world is literally on fire?

Every legislative vote of the under-represented counties has now more than quadrupled in importance to its represented people by the very distress which we here seek to alleviate, but mere "importance" lacks quantitative value in the computation of votes requisite to legislative enactments. The willful and intentional failure of State Legislatures periodically to reapportion themselves, their constitutional mandates notwithstanding, is essentially a moral and political malignancy which must be eradicated in all events.

It is indeed a strange manifestation of equity and fairness to demand States' Rights on the one hand, and at the same time to deny individual rights within the State itself. Obviously these individual rights cannot be salvaged by the people through political resort to the election polls, for the apparent reason that the legislatures will not allow a referendum thereon when so to do would be tantamount to their political demise. Therefore, if relief in the matter of legislative reapportionment is denied by this Court it may not be entirely facetious to predict that some legislatures, assured of their impunity in matters violative of the United States Constitution, may shortly grant Letters of Marque and Reprisal, and even perhaps enact Bills of Attainder against those who dare challenge their authority. And it is feared that in some areas the legislative frustration resulting from the Court's recent nullification of the doctrine of interposition will serve to increase the retaliatory proclivities of such bodies to an extent which might well endanger the enactment of sane legislation, but which condition could, and would, be greatly diluted, if not entirely dissipated upon reapportionment.

The Court, in our humble opinion, unquestionably has jurisdiction. Its intervention is both urgent and imperative. The Court's decision in this case will be far reaching and will very

materially affect the inalienable rights of the qualified electors in all of the fifty states comprising the greatest nation of democracy on earth today. If their pleas shall go unheeded by the courts, they have only one course left to pursue—a course which is fraught with drastic consequences, but which, it is believed by many of its advocates, will be successful if invoked, and so popular is that conviction that newspapers suggest it editorially. If and when, as a last resort, large groups of tax payers in urban areas withhold tax payments from the State, the hospitals, schools and other State institutions will be forced to close their doors, and then, perhaps, the legislatures will come to recognize that legislative larceny will no longer be sanctioned nor tolerated by the people.

To state it mildly, a visitation upon the country of the repercussions resulting by a chain reaction throughout the several states from such a fiscal revolution is not a matter to be viewed with anticipatory delight.

The people are rapidly awakening to the fraud that is being perpetrated upon them, and just how long they will continue to bear the yoke, to yield the stroke and to serve the will of the minority is indeed problematical.

On the evening of Thursday, January 5, 1961, a one hour nation-wide telecast on the Documentary Program of the Columbia Broadcasting System was presented involving the inequities of present legislative apportionment, and in which many of the Nation's leading statesmen, including United States Senators and State Governors, appeared and expressed their deep concern and alarm at the ever increasing deplorable condition prevalent in the matter of State legislative apportionment. And it is noteworthy to suggest that the case here under consideration by the Court, and the Court's announced willingness to hear the same, was mentioned in the telecast as being perhaps the most significant ray of hope on the reapportionment horizon today. It is indeed unfortunate that the telecast, which graphically and pictorially presented the apportionment problems presently existing in Vermont, Idaho, Oklahoma, Mississippi, Tennessee, New York, Pennsylvania, Florida, Georgia and other States, cannot in some way be made an exhibit here for full review by this Court.

IV

THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT REQUIRE JUDICIAL ENFORCEMENT OF THE RULE OF REPRESENTATION ACCORDING TO POPULATION

The principle of representative democracy is fundamental and basic to democratic government in America. Without it our State and National Constitutions would be impotent to give effect to the basic purposes of organized government. As James Madison phrased it (*The Federalist, No.* 39):

> "The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principle of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible."

The politicial philosophy basing our Federal and state Constitutions is that government by the people is representative government; that representative government is a representative legislative body; that a representative legislative body is one selected according to a fair and equitable method.

If the purposes of a State Constitution are to be effectuated, the popular representation provisions of that instrument must be honored. Non-compliance defeats the purpose of the Constitution itself. The judicial role in the problem is one of holding government to its constitutional course.

A failure to secure compliance with the constitutional mandate regularly to reapportion is not merely a matter of a legislative duty left undone; it is a failure to secure for the people such government as our Constitution assures them they shall have. Where the legislative branch has failed to meet so fundamental a duty, the judicial branch should then act to uphold the Constitution. The policies underlying the structure of the government and the distribution of its powers, are not frustrated but rather are fulfilled by such judicial action. As Madison stated in (*The Federalist, No.* 48):

". . . unless these departments be so far connnected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

The argument that the doctrine of the separation of powers precludes jurisdiction, or relief, in the case at bar, is to pervert the text of the doctrine so as to defeat its own ends. The entire sense of the division of government into three separate departments was to establish a system of checks and balances which would avoid the very type of absolute power implied in any defense based upon the separation of powers doctrine. As Hamilton set forth the basis of judicial review in (*The Federalist, No. 78*):

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of a reconcilable difference between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statue."

Woodrow Wilson declared in his classic work *Constitutional Government in the United States,* at pp. 142-3 (1921):

"The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."

Any interpretation which would leave to the legislature the ultimate determination of the nature and scope of its responsibilities in the basic matter of popular representation, would be in derogation of the whole purpose of a written constitution, as well as of the doctrine of separation of powers.

In cases recognizing power of the court to declare apportionment unconstitutional, but refusing to grant relief, an "anarchy" argument has been presented to the courts *in terrorem*. A dismal picture of government dissolved is offered as an excuse for the abdication of the judicial function of guaranteeing observance

of constitutional mandates. The principal authority for the anarchy argument is *Fesler v. Brayton*, 145 Ind. 71, 44 N.E. 37 (1896). That case was decided by a divided court, in which the majority took the position that the court had full jurisdiction to declare an apportionment act unconstitutional, but it should not exercise that jurisdiction where there was no other valid act subsisting under which the members of the General Assembly could be apportioned. Implicit in this view is the notion that the legislature could not be trusted to perform its constitutional duty once that duty was clearly delineated by the court, and that the consequences of such legislative abdication would be the responsibility of the court and not of the legislature.

V

APPROPRIATE RELIEF

It will be noted that in all of the cases involving an attack upon recently enacted apportionment statutes, the defendants were the state election officials, and all orders ran to them. The only exception noted was *Baird v. Board of Supervisors, supra* involving the issuance of a writ of mandamus requiring a county board of supervisors to divide the county into legislative assembly districts of equal population. Further, after invalidating a recently enacted apportionment statute, the courts ordered election of the legislature under the next prior constitutional apportionment law.

A court order against election officials requiring that they hold the election for members of the legislature on an at large basis is essentially no different from holding election under an earlier act that is more discriminatory than the act that has just been declared invalid. In fact, it is far superior in that it possesses one salutory virtue which the other lacks, to-wit, it provides for complete equality as between the electors.

An at-large election is not unique nor is it without precedent. In fact, the entire congressional delegation from Minnesota ran at large in 1932 as the result of the decision of the United States Supreme Court. In *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932) in which the court declared Laws of Minn. 1931, Chap. 640 which apportioned Minnesota into nine Congressional Districts invalid because of a failure to comply with *Article 1, Section 4 of the United States Constitution*, in that

the Governor did not sign the bill and it was not passed by the two-thirds majority required over his veto.

In *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932) the Virginia Legislature, as a result of a reduction in the Virginia delegation to Congress from ten to nine members after the 1930 census, passed a new congressional redistricting act. The Court held the act invalid on the ground of inequality in the size of the Congressional Districts contrary to *Article 2, Section 55 of the Virginia Constitution*. In so doing the Court stated that this was the first time in the 144 years that the entire membership of the House of Representatives of Virginia would be chosen by the electorate of the state at large. The Court stated:

> "However this may be, it is our duty, as it is the duty of all of us, to obey the mandate of the fundamental law."

In the same year Kentucky, Michigan and Missouri elected their entire Congressional delegations at large because the State Legislatures in those states enacted new redistricting laws which were subsequently declared invalid by the courts. There is thus ample precedent to support the relief which appellants here demand, namely, an at-large election.

Moreover in *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1492 (1946) involving the validity of the Illinois Congressional districting act, Mr. Justice Black in his dissenting opinion concurred in by Messrs. Justices Douglas and Murphy said that the at-large election would provide suitable relief because it would place all the electors in the State of Illinois on equal basis. Mr. Justice Rutledge concurred separately with Messrs. Justices Frankfurter, Reed and Burton on other grounds resulting in plaintiffs being denied all relief; however, in so doing he stated:

> "I think, with Mr. Justice Black, that its effect (*Smiley v. Holm*) is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable."

Thus Mr. Justice Rutledge, who joined with Mr. Justice Frankfurter to cast the decisive vote to deny relief in that case, nevertheless fully agreed with Messrs. Justice Black, Douglas and Murphy that the Court could afford plaintiffs the relief they requested, namely, an at-large election. We, therefore, submit that in *Colegrove v. Green, supra*, a majority of the justices sitting in the case agreed that the Court can and in proper circumstances

should order an at-large election.

In considering the *Colegrove* case, *supra*, it is important to bear in mind the first basis agreed upon by the three justices (who together with Mr. Justice Rutledge concurring, constituted a majority) was that the *Federal Reapportionment Act* of June 18, 1929, 46 Stat. L. 26, 2 *USCA* Sec. 2a simply contained no requirement "as to compactness, contiguity and equality in population of (Congressional) districts." The second basis for the decision and the one which the Court regarded as conclusive was that the *Federal Constitution* in Article 1, Sec. 4, had conferred upon Congress exclusive authority to secure fair representation by the States in the House of Representatives and left to that authority the determination of whether the States had properly fulfilled their responsibilities. The Court simply held that the plaintiffs had a complete remedy, to-wit, an appeal to Congress if the Illinois Legislature would not enact another Congressional Reapportionment Act. It is thus evident that the two fundamental bases for the opinion, namely, requirement with respect to equality and a complete remedy in the Congress, are both totally absent in the instant proceedings.

We further submit that the case for Federal judicial intervention in the reapportionment of a state legislature is much stronger than is the case for such intervention in congressional districts. It must be borne in mind that the House of Representatives is automatically reapportioned every ten years. The executive department after each census calculates mathematically the number of representatives each State is entitled to on the basis of its population and relates this information to Congress which, in turn, certifies it to the executive of each state. Thus, as to the 50 subdivisions there is equality of representation in the House. It is then simply a matter of each subdivision providing for equality in districts within itself. While the problem of gross inequality in one distsrict is of paramount importance to the people of that district, its effect on the overall representation in the House is minimal. Further, as to districts there is some incentive to insure equal representation due to the shifting of representatives by loss in one Statae or gain in another. It is not unlikely that the power of Congress to compel equality in the size of the congressional districts would be exercised because, although representatives in one state may be interested in preserving existing inequalities

for personal or selfish reasons, the other members are not interested parties and therefore could easily correct the situation. (See *The Role of the Judiciary in Legislative Reapportionment*, 42 Minn. Law Review 617-634, an excellent note which fully supports appellants' position.)

In *South v. Peters*, 339 U.S. 276, 70 S.Ct. 641, 94 L. Ed. 94 (1950) plaintiff unsuccessfully sought to set aside the Georgia "county unit" voting system in connection with a primary election involving U. S. senators as contrary to the *Fourteenth* and *Seventeenth Amendments*. The Supreme Court *per curiam* affirmed the lower court which held that under applicable Georgia County constitutional principle, there was no guarantee of a substantially equal vote in a primary election and that, therefore, the plaintiff possessed no right which could be constitutionally protected. This case is completely distinguishable and has no relation to legislative representation. Further, the plaintiff sought to challenge the manner in which the state chose to distribute its electoral strength which was admittedly a right retained by the states. In the instant proceeding the manner in which the State of Tennessee has chosen to distribute its electoral strength is not being challenged. This choice has been made and incorporated in the State Constitution in the form of a requirement for apportionment based on population. Discrimination has simply resulted from the legislature ignoring the constitutional mandate.

Three Federal District Court cases, namely, *Remmy v. Smith*, 102 Fed. Supp. 708 aff'd per curiam, 342 U. S. 916, 72 S. Ct. 368, 96 L. Ed. 685, (1952); *Radford v. Garry*, 145 Fed. Supp. 541 aff'd per curiam, 352 U. S. 991, 77 S. Ct. 559, 1 L. Ed. 2d 540 (1957); and *Perry v. Folsom*, 144 *Fed. Supp.* 874 (1956) are also not authority against appellants' position. The *Remmy* case, *supra*, was dismissed by the Court on the ground that it was premature, having been brought in 1951 immediately after the 1950 census without prior resort to the Pennsylvania State courts. The court in dismissing the action as premature stated that a suit based on the *Federal Civil Rights Act* and the *Fourteenth Amendment* would present novel questions as yet undecided. The *Remmy* case, *supra*, was also a mandamus proceeding against the Governor and all members of the State Legislature seeking to require them to pass a new apportionment statute.

In the *Radford* case, *supra*, the plaintiff sought a writ of man-

damus against the Governor, all members of the State Legislature and the Supreme Court, a remedy which the court obviously could not grant. Moreover, Oklahoma has the initiative. The court was fully aware that the citizens in the state had the remedy at hand to correct the situation. The *Perry* case, *supra*, also involved a request for writ of mandamus against the Governor, Lieutenant Governor, Secretary of State and all members of the State Legislature. Again, relief was sought which was beyond the power of the court to grant. Manifestly, the fact that the court does not grant a writ which is beyond its judicial power is certainly not authority against the position urged by these appellants who here seek relief of a type which this Court has complete power to grant.

The appellants herein seek a declaratory judgment and, if necessary, an injunction against the defendant election officials restraining them from holding an election pursuant to the existing legislative apportionment. Equity has on many occasions protected the right to a free and nondiscriminatory election. It is thus clear that the relief that appellants have requested is within the historical jurisdiction of equity. Moreover, the relief requested is not futile because the appellants have brought all parties before this Court who are responsible for the operation of the legislative election machinery in the State of Tennessee. Thus, in the event an injunction becomes necessary, the proper parties are before the Court as defendants, against whom such an injunction should run. The instant proceeding, therefore, is completely unlike that instituted by the plaintiffs in the *Ramey*, *Radford* and *Perry* cases, *supra*. Manifestly, the instant proceeding does not bring the Court in conflict either directly or indirectly with the Tennessee Legislature.

The appellants appear confident that if the injunction which they seek is granted by the Court restraining the holding of the election for members of the State Legislature under the present districting act and directing that the election be held on an at-large basis, the Governor of Tennessee would summon the Legislature into special session to pass a new legislative apportionment act.

The reported cases fairly abound with authority for the proposition that it is the duty of the Court of Equity "to strike a proper balance between the needs of the plaintiff and the con-

sequences of giving the desired relief." *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S. Ct. 641, 92 L.Ed. 784 (1948). Further, "equity will administer such relief as the exigencies of the case demand at the close of the trial." *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 630, 70 S. Ct. 392, 94 L.Ed. 393 (1950). In *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 330, 64 S. Ct. 587, 88 L.Ed. 754 (1944), the court stated:

> "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustments and reconciliation between a public interest and private needs, as well as between competing private claims."

We submit that no principle of equity jurisprudence is more familiar than that illustrated by the foregoing statements. See also *Central Kentucky Co. v. Commissioner*, 290 U.S. 264, 271, 54 S. Ct. 154, 78 L. Ed. 307 (1933) and *Alexander v. Hillman*, 296 U.S. 222, 239, 56 S. Ct. 204, 80 L. Ed. 192 (1935).

Pomeroy's Jurisprudence, Fifth Ed., Sec. 109 states:

> "Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules that govern their use. There is, in fact, no limit to their variety and application; the court of equity has the power of devising its remedy and shape it so as to fit the changing circumstances of every case and the complex relationship of all the parties."

Story, Equity Jurisprudence, 14 Ed. Sec. 28, states:

> "Although they (equity courts) have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of the case. They may adjust the decrees so as to make most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."

McClintock, Equity, 2d Ed. Sec. 30, p. 78 states:

> "The power of a court of equity to mold its decree to meet the needs of the situation is one that is often overlooked by both counsel and court. In many cases the decision is rendered on the apparent assumption that the court must

either grant or refuse in entirety the relief demanded by plaintiff. We have already seen that the court may impose on plaintiff the performance of conditions which will prevent injustice or great hardship to defendant. In other cases the court may, by trial for limited term, determine just how much relief is required to meet the situation, and thereby avoid unnecessary hardship to any of the parties."

VI

MATTERS CONTAINED IN MOTION OF AMICI CURIAE WHICH, THOUGH EXTRANEOUS OF ISSUES PRESENTED IN CASE AT BAR, ARE NEVERTHELESS GERMANE TO THE SUBJECT MATTER

While the relief sought in the Mississippi Case is practically identical to that sought in the case at bar, it is believed that the evils apparent and admitted in the Mississippi Case are perhaps the most brazenly calculated discrimination of human suffrage rights ever presented to a court.

The Mississippi Supreme Court, in passing upon that State's Constitution in the case of *Sproule* vs. *Fredricks,* 11 So. 472, held, inter alia, as reflected in the sylabus of the Court at page 472 as follows:

> "The changes made by the Constitution of 1890 in the basis of suffrage, though violative of Act Cong, 1870, readmitting the State of Mississippi into the Union, do not invalidate that instrument, as Congress has no power to regulate the rights of suffrage."

As to the validity in 1961 of that Court's holding in 1892 to the effect that "Congress has no power to regulate the rights of suffrage" we seriously question and deem it unnecessary to cite authority in contradiction thereto. On Page 474 of the Court's opinion in that case it was held, with respect to the power of a Constitutional Convention:

> "The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework***."

With this holding we are in accord. Moreover, it is manifest that the Court in 1892 had no way of knowing that all Mississippi

legislatures for the next seventy years would purposely ignore the constitutional requirement[2] of decennial reapportionment.

In the case of *Lawson vs. Jeffries,* 47 Miss. 686, 12 Am. Rep. 343, (1873) the Mississippi Supreme Court held that a Constitutional Convention has no power to impair vested rights of individuals and that whether a right has vested is a question for judicial determination. The Court in that case further held:

> "A constitutional convention is convened to build up, not to tear down; to protect, not to destroy. Our American system is peculiarly one of established, regulated law. If, in our system, there is any one feature pre-eminently prominent, it is a sacred regard for law and private rights. A part of the American system, impressed alike upon the people and the States, is the distribution of powers into legislative, executive and judicial. Although a constitutional convention represents the sovereignty of the people, this sovereignty is subordinate to the constitution of the United States and to the great American doctrines of justice, truth, right and law. Even in their sovereign capacity, the people do not possess the license of the commune on the one hand, nor absolute, unrestricted power on the other. Delegates are unrestricted as to the propositions they shall submit to the people; but even ratification does not validate violations of the national constitution, of law, and of rights already established. With the adoption of the federal constitution, arbitrary power, which had heretofore defied the rights of persons and property, was denied an existence, whether in national or State governments, or with the people in their sovereign capacity; and there was ordained a sacred and inviolable separation of legislative, executive and judicial authority. These principles are, with us, fundamental, and cannot be disregarded by a constitutional convention any more than the legislative, executive or judicial departments of a government can exercise the powers of each other. When they do, their acts are void."

When a State Supreme Court, in its official written and reported judicial decision, *Sproule vs. Fredricks, supra,* admits that

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[2] See Appendix A, *infra,* at Page 29.

the State Constitution violates the Act of Congress[3] by which the State was admitted to representation in the United States Congress, could it be seriously contended that a justiciable issue cognizable by this Court does not exist?

When such a State Constitution was never submitted to, nor ratified by, the electorate, could it be said that its adoption by the Convention alone does not violate the prior Constitution[4] requiring that amendments or alterations thereof must be ratified by a majority of the qualified electors?

Can such a Constitution, by an infamous and diabolical scheme perpetrated upon the people of its State, authorize and provide for the election of the Governor of the State[5] and the delegates[6] to the National Party Conventions, wherein Presidential and Vice-Presidential candidates are nominated, upon a basis of votes calculated by the number of representatives in the House from the several counties as established by the census of 1880 and at the same time evade with impunity the *Fourteenth and Fifteenth Amendments?*

Could any such Constitution create and establish a political gerrymander[7], lacking in any ascertainable or rational criteria for the establishment of the districts it created, basing them neither on population nor on area nor on assessed valuation nor on any combination of these or any other legal factors, without offending the *Fourteenth Amendment* to the United States Constitution? Or, will those who would defend such gerrymander dare to explain its real and intended purpose, realizing as they must that to do so would clearly expose the scheme to the inhibitions of the *Fifteenth Amendment* and thereby place themselves squarely within the teeth of this Court's recent holding in *Gomillion vs. Lightfoot*, 5 L. Ed. 2d 110.

Can a State Legislature, by its own enactment alone, increase its numerical composition[8] beyond the constitutional maximum limitation[9]?

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[3] See Appendix B, *infra*, at Page 29.
[4] See Appendix C, *infra*, at Page 31.
[5] See Appendix D, *infra*, at Page 31.
[6] See Appendix E, *infra*, at Page 32.
[7] See Appendix A, *infra*, at Page 29.
[8] See Appendix F, *infra*, at Page 33.
[9] See Appendix A, *infra*, at Page 29.

Can a State Legislature, by its own enactment alone, amend, alter or change its constitution in matters affecting franchise, or otherwise, when such Constitution clearly requires ratification[10] of proposed amendments by the qualified electors as a condition precedent?

Can it be denied that the enactment by a Legislature in 1956 of what may be termed a pseudo apportionment Act[11], giving to some citizens eighteen times the vote of other citizens in either the primary or the general election, lacks that quality which the *Fourteenth* and *Fifteenth Amendments* guarantee?

If these questions are answerable in the affirmative, we earnestly submit that constitutions are meaningless and superfluous, and that anarchy reigns supreme.

CONCLUSION

In conclusion, we most humbly and respectfully submit that the jurisdiction of the Court is manifest; that the wrong is admitted; that the evils are obvious; that the remedy is clear; that the relief is available, and this Court has never been found wanting in courage where the defense of human rights is involved.

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[10] See Appendix C, *infra*, at Page 31.
[11] See Appendix F, *infra*, at Page 33.

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APPENDIX A

ARTICLE XIII, SECTION 256 OF MISSISSIPPI CONSTITUTION OF 1890. The legislature may, at the first session after the Federal census of 1900, and decennially, thereafter, make a new apportionment of senators and representatives. At each apportionment each county then organized shall have at least one representative. The counties of Tishomingo, Alcorn, Prentiss, Lee, Itawamba, Tippah, Union, Benton, Marshall, Lafayette, Pontotoc, Monroe, Chickasaw, Calhoun, Yalobusha, Grenada, Carroll, Montgomery, Choctaw, Webster, Clay, Lowndes and Oktibbeha, or the territory now composing them, shall together never have less than forty-four representatives. The counties of Attala, Winston, Noxubee, Kemper, Leake, Neshoba, Launderdale, Newton, Scott, Rankin, Clarke, Jasper, Smith, Simpson, Copiah, Franklin, Lincoln, Lawrence, Covington, Jones, Wayne, Greene, Perry, Marion, Pike, Pearl River, Hancock, Harrison, and Jackson or the territory now composing them, shall together never have less than forty-four representatives; nor shall the remaining counties of the state, or the territory now composing them, ever have less than forty-four representatives. A reduction in the number of senators and representatives may be made by the legislature if the same be uniform in each of the three said divisions; but the number of representatives shall not be less than one hundred, nor more than one hundred and thirty-three, nor the number of senators less than thirty, nor more than forty-five, provided that new counties hereafter created shall be given at least one representative until the next succeeding apportionment.

APPENDIX B

CHAP. XIX.—*An Act to admit the State of Mississippi to Representation in the Congress of the United States.*

WHEREAS the people of Mississippi have framed and adopted a constitution of State government which is republican; and whereas the legislature of Mississippi elected under said constitution has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said State of Mississippi is entitled to representation in the Congress of the United States: Provided, That before any member of the legislature of said State shall take or resume his seat, or any officer of said State shall enter upon the duties of his office, he shall take and subscribe, and file in the office of the secretary of State of Mississippi, for permanent preservation, an oath or affirmation in the form following: "I .....
....., do solemnly swear (or affirm) that I have never taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United

States, and afterward engage in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof, so help me God"; or under the pains and penalties of perjury, (as the case may be); or such person shall in like manner take, subscribe, and file the following oath or affirmation: "I, ..., do solemnly swear (or affirm) that I have, by act of Congress of the United States, been relieved from the disabilities imposed upon me by the fourteenth amendment of the Constitution of the United States, so help me God"; or under the pains and penalties of perjury, (as the case may be;) which oaths or affirmations shall be taken before and certified by any officer lawfully authorized to administer oaths. And any person who shall knowingly swear or affirm falsely in taking either of such oaths or affirmations shall be deemed guilty of perjury, and shall be punished therefor by imprisonment not less than one year, and not more than ten years, and shall be fined not less than one thousand dollars, and not more than ten thousand dollars. And in all trials for any violation of this act, the certificate of the taking of either of said oaths or affirmations, with proof of the signature of the party accused, shall be taken and held as conclusive evidence that such oath or affirmation was regularly and lawfully administered by competent authority: *And provided further*, That every such person who shall neglect for the period of thirty days next after the passage of this act to take, subscribe, and file such oath or affirmation as aforesaid, shall be deemed and taken, to all intents and purposes, to have vacated his office; *And provided further, That the State of Mississippi is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions: First, That the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized*, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, That the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

APPROVED, February 23, 1870. (Emphasis added)

APPENDIX C

ARTICLE XIII OF MISSISSIPPI CONSTITUTION OF 1869

ARTICLE XIII

ORDINANCES AND SCHEDULE.

MODE OF REVISING THE CONSTITUTION.

Whenever two-thirds of each branch of the legislature shall deem any change, alternation, or amendment necessary to this constitution, such proposed change, alteration or amendment, shall be read and passed by a two-thirds vote of each house respectively, on each day, for three several days; public notice shall then be given by the secretary of state, at least three months preceding the next general election, at which the qualified electors shall vote directly for or against such change, alteration or amendment; and if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form, that the people may vote for or against each amendment separately; and if it shall appear that a majority of the qualified electors, voting for members of the legislature, shall have voted for the proposed change, alteration or amendment, then it shall be inserted by the next succeeding legislature as a part of this constitution, and not otherwise; *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight-five, shall, in any manner, affect the eighteenth section of the bill of rights.

APPENDIX D

SECTIONS 140 AND 141 OF MISSISSIPPI CONSTITUTION OF 1890

Section 140. The governor of the state shall be chosen in the following manner: On the first Tuesday after the first Monday of November of A. D. 1895, and on the first Tuesday after the first Monday of November in every fourth year thereafter, until the day shall be changed by law, an election shall be held in the several counties and districts created for the election of members of the house of representatives in this state, for governor, and the person receiving in any county or such legislative district the highest number of votes cast therein, for said office, shall be holden to have received as many votes as such county or district is entitled to members in the house of representatives, which last named votes are hereby designated *"electoral votes."* In all cases where a representative is apportioned to two or more counties or districts, the electoral vote, based on such representative, shall be equally divided among such counties or districts. The returns of said election shall be certified by the election commissioners, or a majority of them, of the several counties, and transmitted, sealed, to the seat of government, directed to the secretary of state, and shall be by him safely kept and delivered to the speaker of the house of representatives at the next ensuing session of the legislature within one day after he shall have been elected.

The speaker shall, on the next Tuesday after he shall have received said returns, open and publish them in the presence of the house of representatives, and said house shall ascertain and count the vote of each county and legislative district and decide any contest that may be made concerning the same, and said decision shall be made by a majority of the whole number of members of the house of representatives concurring therein, by a viva voce vote, which shall be recorded in its journal; Provided, In case the two highest candidates have an equal number of votes in any county or legislative district, the electoral vote of such county or legislative district shall be considered as equally divided between them. The person found to have received a majority of all the electoral votes, and also a majority of the popular vote, shall be declared elected.

Section 141. If no person shall receive such majorities, *then the house of representatives shall proceed to choose a governor* from the two persons who shall have receieved the highest number of popular votes. The election shall be by viva voce vote, which shall be recorded in the journal, in such manner as to show for whom each member voted.

(Emphasis added)

APPENDIX E

SECTION 3107 OF MISSISSIPPI CODE, 1942, ANNOTATED (RECOMPILED)

§3107. State, district and county executive committees—how chosen.

The state executive committee shall consist of three members from each congressional district, to be chosen by the delegates from the different congressional districts, each district acting separately, and shall hold office for four (4) years and until their successors are chosen. A state convention shall be held by each political party in the state, in the year 1952, and every four (4) years thereafter, at the time and place to be designated by the state executive committee, appropriate notice of which shall be given by said committee, to select a state executive committee, to appoint delegates to the national convention, at the discretion of said state convention, to nominate presidential electors, to nominate a candidate for president and vice-president of the United States, adopt a platform, promulgate principles, and take such further action deemed proper by the convention. And the said convention may adjourn from day to day, or to such time and place, or times and places, as to it may appear proper and desirable. It is expressly provided that the state convention shall not in anywise be limited in the nomination of candidates for president and vice-president by any nomination made by any other convention. *Each county shall be entitled in the state convention to a number of votes equal to double its representation* in the House of Representatives. The delegates are to be selected by county delegate conventions, to be held in each county. Delegates shall be apportioned equally among the supervsiors' districts of each county, or each precinct in the county may be given representation in the county delegate convention in proportion to the votes cast as the preceding

presidential election for its party candidates. The state executive committee, or the chairman thereof, shall designate a date, giving at least ten (10) days' notice, for the precinct elections, on which date the electors at such precinct shall meet at ten o'clock A.M. at the usual voting places, and by secret ballot elect delegates to represent such voting precincts in the county convention. The county executive committee shall designate the number of delegates to be elected, and if it fail to designate a number each precinct will be entitled to one delegate in the the county convention. The delegate convention of each county shall choose a county executive committee, consisting of three members from each supervisor's district as above provided, and the county executive committee may, in their discretion, select from the county at large three (3) additional members of the committee, who shall hold office until the county convention convenes four (4) years later, but a county executive committee can submit the choice of their successors to any primary election held for other purposes, in which the committee so chosen shall hold office until the next county convention assembles under the provisions of this section. Flotorial and senatorial executive committees shall continue in office until after the returns are received and acted upon for the next general election, after which their successors are to be appointed by the various county executive committees composing such districts. All the present executive committees now acting shall continue until their successors are chosen, as herein provided. All vacancies in state and county executive committees shall be filled by such committees themselves and from the district in which the vacancies occur. All other vacancies are to be filled by the new executive committeemen, appointed by the county executive committees of the counties which made the original appointments. Executive committees for senatorial and flotorial districts having none, may be appointed by the various executive committees of the counties composing such districts. In any new county hereinafter created the members of the executive committee or committees for the county or counties from which the new county is taken who are resident citizens of the new county, at the time it is created shall constitute the first executive committee for the new county until their successors are selected in the manner provided by law, and they may fill any vacancy on the committee.

(Emphasis Added)

APPENDIX F

SECTION 3326 OF MISSISSIPPI CODE, 1942, ANNOTATED (RECOMPILED)

BEING CHAPTER 408, MISSISSIPPI LAWS OF 1956

Section 3326. Representatives — apportionment.

The number of representatives in the lower house of the Legislature shall be apportioned as follows:

First. The counties of Choctaw, Covington, Green, Hancock, Issaquena, Jones, Lawrence, Leflore, Marion, Neshoba, Pearl River, Perry, Quitman, Scott, Sharkey, Simpson, Smith, Sunflower, Tallahatchie,

Tishomingo, Tunica, Wayne, and Webster, each shall have one representative. In addition to the foregoing, the counties of Forrest, George, Humphreys, Jefferson Davis, Lamar, Stone, and Walthall shall each have one representative until an apportionment as provided for in the constitution shall be made by the Legislature.

Second. The counties of Alcorn, Attala, Coahoma, DeSoto, Newton, Pike, Pontotoc, Prentiss, Rankin and Union shall each have two (2) representatives and one of said representative positions is hereby designated "Representative Post No. 1" and the other representative position is hereby designated "Representative Post No. 2", and all candidates hereafter desiring to be elected to the Legislature as one of the representatives of Alcorn, Attala, Coahoma, DeSoto, Newton, Pike, Pontotoc, Prentiss, Rankin and Union Counties, shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2" and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire county shall elect representatives for both posts. The counties of Bolivar, Yalobusha, and Carroll, each shall have two (2) representatives, but both representatives shall at no time be chosen from the same judicial district of the county.

Provided further, that Kemper County shall have two (2) representatives without designation as to posts and who shall run from the county at large, as has been the custom, and under the same conditions as in the past.

Third. The counties of Holmes and Washington each shall have three (3) representatives; and one of said representative positions is hereby designated "Representative Post No. 1"; and one of said representative positions is hereby designated "Representative Post No. 2", and the remaining representative position is hereby designated "Representative Post No. 3", and all candidates hereafter desiring to be elected to the Legislature as one of the representatives of Holmes and Washington Counties, shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2" or "for the Representative Post No. 3", and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire county shall elect representatives for all three (3) posts.

The representation in the lower house of the Legislature for Warren County shall be selected as follows:

Two (2) representatives shall be elected from the county at large, and may come from any part of the county, and one representative shall be elected by the county at large but must come from that part of the county outside of the City of Vicksburg and the municipalities adjacent thereto. One of the said representative positions to be elected from the county at large is hereby designated "Representative Post

No. 1", and the other representative position to be elected from the county at large is hereby designated "Representative Post No. 2." The remaining representative position in Warren County to be elected by the county at large, but which must come from that part of the county outside of the City of Vicksburg and the municipalities adjacent thereto, is hereby designated "Representative Post No. 3." All candidates hereafter desiring to be elected to the Legislature as one of the representatives of Warren County, shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2," or "for the Representative Post No. 3," and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire county shall elect representatives for all three (3) posts.

Fourth. The counties of Monroe, Noxubee, Copiah, and Panola shall have three (3) representatives.

Fifth. The counties of Franklin and Lincoln each shall have one representative and a floater between them.

Sixth. The counties of Tippah and Benton each shall have one representative and a floater between them.

Seventh. The counties of Claiborne and Jefferson each shall have one representative and a floater between them.

Eighth. The counties of Clarke and Jasper each shall have one representative and a floater between them.

Ninth. The counties of Grenada and Montgomery each shall have one representative and a floater between them.

Tenth. The counties of Leake and Winston each shall have one representative and a floater between them.

Eleventh. The counties of Harrison and Jackson each shall have one representative and a floater between them. The election of the floater representative shall be alternated between the two (2) counties every four (4) years, the floater being elected from Harrison County in 1955.

Twelfth. The county of Yazoo shall have three (3) representatives, and the County of Hinds shall have three (3) representatives, and they shall have a floater between them. Provided, however, that two (2) of the representatives of Hinds County shall be elected by the City of Jackson and that one of the representatives of Hinds County shall be elected outside the limits of the City of Jackson. Provided, further, however, that the district qualifications of the representatives of Hinds County shall not apply to the floater representatives.

Two (2) representatives from Hinds County shall be elected from the City of Jackson, located therein; one of said representative positions is hereby designated "Representative Post No. 1" and the other representative position is hereby designated "Representative Post No. 2", and the remaining representative to be elected from Hinds Couunty shall be elected outside the limits of the City of Jackson, is hereby designated as "Representative Post No. 3," and all candidates hereafter

desiring to be elected to the Legislature as one of the representatives of Hinds County shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2," or "for the Representative Post No. 3," and after the time for parties to announce for office, if there should be but one candidate for one of said representative positions or election posts, or only one candidate for each of said representative positions or election posts, then such candidate may be declared to be elected without opposition.

Thirteenth. The counties of Amite, Madison and Wilkinson shall have two (2) representatives.

Fourteenth. The county of Marshall shall have three (3) representatives.

Fifteenth. The county of Lauderdale shall have three (3) representatives, one representative to be elected by the City of Meridian, and said representative position is hereby designated "Representative Post No. 1," one representative by the county outside the city limits, and said representative position is hereby designated "Representative Post No. 2," and one representative by the whole county, including Meridian, is hereby designated "Representative Post No. 3". All candidates hereafter desiring to be elected to the Legislature as one of the representatives of Lauderdale County shall announce his or her candidacy "for the Representative Post No. 1," or "for the Representative Post No. 2," or "for the Representative Post No. 3," and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared ~~to be elected~~ without opposition.

Sixteenth. The county of Adams outside the City of Natchez shall have one representative, and the City of Natchez one representative.

Seventeenth. The county of Lowndes shall have three (3) representatives, two (2) of whom shall be elected by that part of the county east of the Tombigbee River and one by that portion of the county west of said river; and one of said representative positions in that part of the county east of the Tombigbee River is hereby designated "Representative Post No. 1," and the other representative position east of the Tombigbee River is hereby designated "Representative Post No. 2," and all candidates hereafter desiring to be elected to the Legislature as one of the representatives east of the Tombigbee River in Lowndes County shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2," and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire area of Lowndes County east of the Tombigbee River shall elect representatives for both posts.

Eighteenth. The county of Oktibbeha shall have two (2) representatives, one of whom shall be elected by that portion of the county east

of the line running north and south between ranges thirteen (13) and fourteen (14), and the other by that portion of the county west of said line.

Nineteenth. The county of Lee shall have two (2) resesentatives, the county of Itawamba one, and a floater between them. The county of Lee shall have two (2) representatives, and one of said representative positions is hereby designated "Representative Post No. 1," and the other representative position is hereby designated "Representative Post No. 2," and all candidates hereafter desiring to be elected to the Legislature as one of the representatives of Lee County shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2," and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire county shall elect representatives for both posts.

Twenieth. In counties divided into legislative districts any citizen of the county eligible for election to the House of Representatives shall be eligible to represent any district thereof.

Twenty-first. The counties of Clay, Calhoun, Lafayette, and Tate shall each have two (2) representatives; and one of said representative positions is hereby designated "Representative Post No. 1" and the other representative position is hereby designated "Representative Post No. 2," and all candidates hereafter desiring to be elected to the Legislature as one of the representatives of Clay, Calhoun, Lafayette, and Tate Counties, shall announce his or her candidacy "for the Representative Post No. 1" or "for the Representative Post No. 2," and after the time for parties to announce for office, if there should be but one candidate for one of said election posts, or only one candidate for each of said posts, then such candidate may be declared to be elected without opposition, and the electors of the entire county shall elect representatives for both posts.

Twenty-second. The county of Chickasaw shall have two (2) representatives, one of whom shall be a resident of and shall be elected by the qualified electors of that portion of the county in the first judicial district and the other shall be a resident of and shall be elected by the qualified electors of that portion of the county situated in the second judicial district.

Twenty-third. The county of Warren shall have three (3) representatives, one of whom shall be a resident of that part of said county outside of the corporate limits of the City of Vicksburg. All of said representatives shall run from and be elected by the county at large.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1961

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLANTS

Opinion Below

The Opinion of the District Court of the United States for the District of Tennessee is reported at 179 F. Supp. 824 (M.D. Tenn. 1959).

Jurisdiction

This suit was brought under 28 U.S.C. § 1343 (3) and (4) (62 Stat. 932, as amended); 42 U.S.C. § 1983 and § 1988 (17 Stat. 13 and 16 Stat. 144, as amended); and 28 U.S.C. § 2201-2202 (62 Stat. 964, as amended 72 Stat. 349), seeking a declaratory judgment as well as an interlocutory and permanent injunction restraining the enforcement, operation, and execution of an Act of Apportionment, Public Acts of Tennessee, Ch.

122 (1901), now Tenn. Code Ann. § 3-101 through 3-107 (1956).

The opinion of the District Court of the United States for the Middle District of Tennessee was rendered on a motion to dismiss, without the taking of any testimony, on December 21, 1959, and an order was entered by the district court on February 4, 1960. Notice of appeal was filed on March 27, 1960. The jurisdictional statement was filed in this Court on May 26, 1960, and the Court noted probable jurisdiction on November 21, 1960, 29 LW 3152. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253 (62 Stat. 926).

Statutes and Constitutional Provisions Involved

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956), which is set forth in Appendix A, infra at page 50, 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. 2201, 2202, which are set forth in Appendix B, infra at page 54. The UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2, which is set forth in Appendix C, infra at page 56.

TENN. CONST., art. I § 5 (1870):

Sec. 5. *Elections to be free and equal, right of suffrage declared.*—That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

TENN. CONST., art. II, §§ 3, 4, 5, 6, and 11 (1870):

Sec. 3. *Legislative authority; term of office.*—The legislative authority of this state shall be vested in a general assembly which shall consist of a senate and house of representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. *Census.*—An enumeration of the qualified voters, and an apportionment of the representatives in the general assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. *Apportionment of representatives.*—The number of representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the state shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. *Apportionment of senators.*—The number of senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the house of representatives, shall be made up to such county or counties in the senate, as near as may be practicable. When a district is composed of two or more counties, they shall be

adjoining; and no county shall be divided in forming a district.

Sec. 11. *Powers of each house; quorum; adjournments from day to day.*—The senate and house of representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and election of its members, and sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members.

Questions Presented

1. Whether the Tennessee statute, which in 1901 affirmatively created an inequality of voting rights, through an unlawful apportionment of legislative representation, continued and worsened by purposeful and systematic legislative refusal to obey the decennial reapportionment requirement of the state constition and the state constitutional guarantee of free and equal elections, is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Whether a District Court of the United States may grant relief where the District Court has found (a) that the Tennessee statute unequally apportions legislative representation in violation of the state constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the state, (b) that in consequence the state legislature is guilty of a clear violation of the state constitution and of

the rights of the plaintiff voters under the federal and state constitutions, and (c) that the evil is a serious one which should be corrected without delay.

STATEMENT OF THE CASE

This action was brought in 1959 by appellants who were the plaintiffs below, qualified voters and taxpayers in the State of Tennessee, against state election and other officials (appellees) in their representative capacities, under the federal Civil Rights Acts and the federal Declaratory Judgment Act,[1] to invalidate a statute which denies the equality in voting rights guaranteed to appellants by the Constitution of Tennessee[2] and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Since the judgment below was entered upon a motion to dismiss by the appellees without the hearing of testimony, on this appeal the facts well pleaded by appellants are taken to be true.[3]

The Tennessee Constitutional Formula

Under the Tennessee Constitution, the legislature (General Assembly) is comprised of a Senate and a House of Representatives. There is a maximum number of members (reached in 1880), ninety-nine in the House and thirty-three in the Senate, but membership in both houses is proportioned to the qualified voting

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[1] The Civil Rights statutes are 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1952); 16 Stat. 144 (1870) as amended, 42 U.S.C. § 1988 (1952); 62 Stat. 932 (1944) as amended, 28 U.S.C. § 1343 (3) and (4) (1957). The declaratory judgment statute is 62 Stat. 964 as amended 72 Stat. 349, 28 U.S.C. 2201, 2202.

[2] TENN. CONST., art I, § 5 (1870).

[3] *Gomillion* v. *Lightfoot*, 364 U.S. 339.

population.[4] The seats in the Senate and House are to be apportioned according to the qualified voters among the counties (there are 95) or districts (comprising one or more whole adjoining counties), provided that in the House a county having two-thirds of the voting population needed to qualify for one seat shall be entitled to one seat.[5]

In declaring the right of suffrage, the state constitution provides that "elections shall be free and equal",[6] and it is required that there shall be an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties or districts according to the number of qualified voters.[7] Thus the constitutional formula guarantees equality of voting rights through equality of representation as nearly as is practicable.

The Deterioration of Voting Rights

The last Act reapportioning the number of legislators was passed in 1901.[8] This Act was in violation of law then because an enumeration of qualified voters was not made and the actual number of qualified

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[4] Art. II, sec. 3 of the Tennessee Constitution specifies that both houses shall be "dependent upon the people".

[5] TENN. CONST., art II, Secs. 3, 4, and 6 (1870). In apportioning seats for the Senate the fraction that may be lost by any counties in the apportionment of members to the House shall be made up to such counties as near as may be practicable. Section 6.

[6] TENN. CONST., art I, § 5 (1870).

[7] TENN. CONST., art II, §§ 4, 5 and 6 (1870).

[8] Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956).

voters in the state was ignored.[9] As a result, eleven counties were immediately under-represented.[10]

Furthermore, after 1911, the Act of 1901 was no longer a constitutional basis for the election of representatives and senators because a new enumeration of qualified voters as well as a new apportionment of representation in the General Assembly was required in 1911 and every ten years thereafter.[11]

Each and every Tennessee legislature since 1901, including the legislature in office at the time the complaint in this case was filed, has failed to reapportion the number of legislators required to be elected from the several counties and districts of the state. Systematically and purposefully, the General Assemblies elected since 1901 have defeated all bills proposing reapportionment of the legislature.[12]

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[9] It was proposed in the legislature (but apparently not adopted) that the federal census of 1900 be used. An exhaustive search of the records in the office of the Tennessee Secretary of State and of the State Archives has failed to produce any report concerning an enumeration of voters in 1901. Intervening complaint of Ben West, exhibit 2, R 138-139.

[10] R 232.

[11] TENN. CONST., art II, §§ 4, 5 and 6 (1870).

[12] See "A Documented Survey of Legislative Apportionment in Tennessee, 1870-1957" [the printed record erroneously labels it to 1929], exhibit 2, intervening complaint of Ben West, R 126, 144-160. As plainly stated by Governor Frank G. Clement in a 1955 message to the Tennessee legislature:

> "Our Constitution provides that the State shall be redistricted for the purposes of determining proper representation every ten years. This provision of our basic law has not been obeyed for nearly 50 years—since, in fact, the year 1901 [erroneously 1907 in text], when the last reapportionment was accomplished. The districts set up at that time are still in effect, except for

During the period from 1900 to 1950, the counties in which appellants reside experienced a substantial growth in population. This growth has meant that Davidson County, which had 33,311 in its voting population in 1900, by 1950 had 211,930 in its voting population. Likewise, in terms of voting population, by 1950 Shelby County had grown from 43,843 to 312,345; Knox County had grown from 19,049 to 140,559; Montgomery County had grown from 8,712 to 26,284; and Hamilton County had grown from 16,892 to 131,971.[13]

As a result of the refusal of succeeding Tennessee General Assemblies to provide for an enumeration of qualified voters in the state every ten years since 1901, and to apportion the legislative representation according to the number of qualified voters in the several counties or districts, by 1950 some 23 Tennessee counties possessed 25 direct representatives when their total voting population actually entitled them to only 2 direct representatives.[14] In contrast, ten counties,

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minor changes not following any logical pattern, and, in some cases, there are glaring inequalities. . . ." R 155-156.

Appellants advised each member of the 81st General Assembly shortly after it convened in January, 1959, of the intention to bring the instant court action, expressing the hope that that legislature, now defunct, would take appropriate action before its adjournment, R 14.

[13] R 236, Amendment and supplement to the intervening petition of Ben West, exhibit 7. These counties have been experiencing an even more rapid rate of growth in the last ten years. The 1960 census, completed after this action was commenced, shows in a table being prepared for publication and made available by the U.S. Bureau of the Census, for Davidson County 242,933, Shelby County 359,532, Knox County 151,999, Montgomery County 30,419, and Hamilton County 142,979, voting population.

[14] Ibid, exhibit 4, R 231.

including those where the appellants reside, had but 20 direct representatives, although actually entitled in 1950 to a total of 45 direct representatives under the state constitutional formula.[15]

By 1950, assuming all 33 state senators were apportioned on the basis of the Tennessee total voting population, each Tennessee senatorial district would have represented 59,956 voters.[16] Nevertheless at that time only one senator each represented the 30th, 32nd, and 33rd senatorial districts (composed almost entirely of Shelby County) with 109,430 qualified voters per senator in each district; the 16th and 17th senatorial districts (composed of Davidson County) with 105,965 qualified voters per senator in each; the 5th and 6th senatorial districts (predominantly Knox County) with 102,726 qualified voters per senator in each; and the 8th senatorial district (composed of Hamilton County) with 131,871 qualified voters per senator.[17] On the other hand, 19 of the 33 senatorial districts each had less than 90% of the approximately 60,000 standard for voting population, in fact six of the districts each represented less than 30,000 in voting population and another seven represented less than 40,000 voting population each.[18]

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[15] Ibid, exhibit 5, R 234.

[16] Id., exhibit 7, R 240. In 1950, the total Tennessee voting population was 1,978,548. This figure divided by 33, the number of state senators, equals 59,956. (The 1960 total voting population, per the U.S. Census Bureau information being prepared for publication, is 2,092,891.)

[17] Ibid, R 236-240.

[18] Ibid.

Results of the Inequality

The inequality and unfairness in perpetuating voting and representation under the challenged 1901 Act is further illustrated by comparing its provisions with the representation which would be required in the case of four of the most populous counties, using 1950 voting population figures.

Under the Act of 1901, Shelby County, for example, was given and presently has only 7 members in the Tennessee House of Representatives and 2 direct and one floterial senator in the state Senate.[19] Using the 1950 federal census of voting population,[20] Shelby County, where appellant Baker resides, was entitled to 15 members in the House of Representatives, and 5 Senators.[21] Similarly, Davidson County, where appellant West resides, was entitled under 1950 voting population figures to 10 representatives and 3 senators, but was given in 1901 and now has 6 representatives and 2 senators;[22] Knox County, where appellant

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[19] Appendix A, post, Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901) now Tenn. Code Ann. § 3-101 to 3-107 (1956). (Also R 67-71). A direct senator or representative is elected by and represents the voters of a single county. A floterial or floaterial senator or representative is elected by and represents the voters of two or more counties. Actually, the 1901 Act was incipiently deficient since it gave Shelby County (among other counties) one less direct representative than the county was entitled to in disregard of the voting population (as shown by the 1900 federal census) and the state constitutional requirement. Art. II, sec. 5, R 232.

[20] U.S. Census of Population: 1950. Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 42, pp. 92-97.

[21] Amendment and supplement to the intervening petition of Ben West, exhibit 5, R 234; Exhibit B to complaint of Baker et al., R. 22.

[22] Ibid.

Smith resides, was entitled to 7 representatives and 2 senators in 1950, but was given and now has 3 representatives and 1 senator;[23] Hamilton County, where appellant McGauley resides, was entitled to 6 representatives and 2 senators in 1950, but was given and now has 3 representatives and 1 senator.[24]

The significant state population changes since 1901 and the failure and refusal of the various Tennessee legislatures to reapportion since that date have reduced the equality of appellants' votes to a fraction of the effectiveness of those of voters residing in other state counties and electoral districts. Other voters in some of these counties and districts have a full vote, while still others of a selected minority in the state have the equivalent of ten or more times the vote allowed the appellants, in choosing members of the state legislature. Because appellants have on the average as little as one-tenth (1/10) of a vote in choosing members of the state legislature they have sought by this action to regain their rightful equal vote recognized and guaranteed by the Fourteenth Amendment of the Federal Constitution and the Tennessee Constitution.

The record before this Court establishes a purposeful and systematic plan, by continued enforcement of the originally unlawful Act of 1901, to discriminate against a geographical class of persons in Tennessee in their individual voting rights, with the effect of maintaining control of the state legislature in a selected minority of the Tennessee voting population. As a result, a favored 37% of the voters in Tennessee elect 20 of the

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[23] Ibid.

[24] Ibid. It should be noted that Rutherford, Bradley, Morgan, Blount, Campbell, Johnson, and Carter counties are unjustly denied separate representation. Baker complaint, ex D, R 26.

33 members of the state senate, while the remaining 63% of the voters elect but 13 of the 33 members. For the House of Representatives, a similarly favored 40% of the voters elect 63 of the 99 members of the House, while the remaining 60% of the voters elect only 36 of the 99 members.[25] In round figures, statewide, a ⅓ minority of the voters from predominantly sparsely populated counties, select a ⅔ majority of both houses. Significantly, no bill seeking reapportionment of the legislature since 1901 has received more than 13 votes in the state Senate nor more than 36 votes in the House.[26]

Illustrations of Some of The Practical Effects of The Inequality

Indictative of the effects of the denial of equal voting rights and under-representation has been the systematic use by the controlling minority of its powers, not only to perpetuate its control, but to derive special advantages at the expense of the under-represented majority of the people in such matters as the distribution of state funds. Statutes have been enacted for the support of the public schools and the maintenance of roads and highways, with distribution formulas which deliberately favor the over-represented counties. For example, Laws 1959 ch. 14, House Bill No. 123, in providing for a distribution of revenues collected in support of the educational system of the state, exempts the over-represented counties from application of the formula for contribution to their own county educational needs required of the under-represented counties where appellants live, but nevertheless guarantees the

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[25] Baker et al. complaint, Exhibits E and F, R 28-31.

[26] West complaint, exhibit 2, R 126.

exempt counties school funds in amounts previously paid to them by the state.[27]

Similar discriminatory results have occurred in respect to highway improvement. Of the seven cents collected by the state for the storage and sale of each gallon of gasoline, two cents is paid into a separate fund known as "County Aid Funds". Notwithstanding that said funds are derived from the consumption of gasoline one-half of the fund is distributed equally among the ninety-five counties of the state, one-fourth is distributed among the ninety-five counties on the basis of area, and only the remaining one-fourth is distributed among the counties on the basis of population.[28]

In the 1957-1958 apportionment of the county aid funds, the General Assembly permitted 23 counties to receive 57.9% more state aid than would be the case on a basis of state aid per capita, and it turns out that these counties had 23 more direct representatives than permitted under the state constitution. Ten counties, having 25 less direct representatives than required by the Tennessee Constitution,[29] among them Shelby, Knox, Hamilton, and Davidson, received 136.9% less state aid than on a per capita basis. Expressed another way, a voter in Moore County (with a voting population in 1950 of 2,340) has 17 times as much representation in the lower House as does a voter in Davidson County (1950 voting population 211,930), and Moore County receives 17 times the apportionment per vehicle of state gasoline taxes as does Davidson county.

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[27] Baker et al. complaint, R 17-18, and see R 161, particularly sub-paragraph (4) of Section 4 of House Bill 123 (R 172-173).

[28] Baker et al. complaint, R 16; Tenn. Code Ann., § 54-403 (1956).

[29] Amendment to West complaint, exhibit 9, R 254.

These discriminatory distribution formulas in turn directly limit the counties in which appellants reside in the share they may obtain of federal aid for highway construction, because these funds are made available to the counties on a "fund matching basis".[30]

Similar patterns of unfair and arbitrary distribution of funds exist in respect of state sales and use taxes, income taxes, and alcoholic beverage and beer taxes.

The Closed Door To Direct State Relief

The preferential advantages achieved by the few at the expense of the many, in such things, among others, as the distribution of state funds, have provided the unrepresentative Tennessee General Assemblies of the last half-century an obvious motive for continued denial of equal voting rights and equal representation of large groups of persons geographically situated as plaintiffs are.

Unless judicial assistance is provided to stimulate the required corrective action, the discrimination in voting rights will continue, hopelessly, and will grow in proportion with the current trends of population growth.

Historical data made part of the pleadings[31] shows that all attempts since 1901 to obtain revision of the unlawful Act of 1901 and to obtain the required decennial reapportionments have been defeated in the legislature; and that no bill seeking to reapportion since 1901 has received more than 13 votes of the 33 in the Senate or more than 36 votes of the 99 in the House. Governors of Tennessee have repeatedly called

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[30] Ben West complaint, R 119-120.

[31] Documented Survey of Legislative Apportionment in Tennessee, 1870-1957, R 126-160.

upon the General Assembly for a fair apportionment law to no avail (for example, R 135, 145-147, 153, 155, 156-157).

The Tennessee Supreme Court has sealed the closed door of the legislature by holding that if it were to declare the Act of 1901 unconstitutional, it would deprive the state of its legislature and bring about the destruction of the state itself.[22]

A state constitutional convention is not an available remedy, because such a convention can only be called by a majority vote of two successive General Assemblies, Tenn. Const., art XI, sec. 3 (1870). All such proposals have been rejected in the past. Even if a convention were to be authorized, its delegates would be chosen in the unrepresentative manner reflecting the present legislative apportionment.

The Governor has no authority to assemble a constitutional convention, and the state constitution contains no provisions for direct popular action by initiative or referendum.

The Application For Federal Judicial Assistance

A remedy which would contemplate direct action against the state legislature or its members, requiring them to reapportion membership in the legislature among the counties and districts, has not been sought in this case. Named as defendants were the Secretary of State, the Attorney General, the Coordinator of Elections and the members of the State Board of Elections. The District Court was asked to do four things: (1) to enjoin the named defendants (appellees) from further enforcement of the Act of Apportionment

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[22] *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d 40 (1956), appeal dismissed 352 U.S. 920, see R 65.

of 1901 thus preventing future elections thereunder, (2) to declare unconstitutional and to enjoin enforcement of the Act of Apportionment of 1901, (3) to order an election at large without regard to the counties or districts, or (4) in the alternative, to direct the defendants (appellees) to hold an election in accordance with the formula for legislative representation provided in the state constitution, using the 1950 or subsequent federal census to determine the number of qualified state voters.

The District Court found that the issues presented in this case were "of such a character that they should be evaluated by a three-judge court." In referring the matter to a statutory court, District Judge Miller's opinion of July 31, 1959, cited certain differences between the case of *Colegrove* v. *Green*, 328 U.S. 549, and the case at bar. He pointed out that because the Act of Congress involved in the *Colegrove* case contained no requirement that congressional districts be approximately equal in population, the legislature of Illinois did not violate any provision of its own constitution or any provision of federal law. Further, he pointed to this Court's view in the *Colegrove* case, that there was ample power vested in Congress to redistrict if the congressional districts set up by state law were inequitable. But in Tennessee, said Judge Miller:

> "In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality, but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all." R 91.

A motion to dismiss was filed by the appellees upon the grounds that the statutory court did not have jurisdiction of the subject matter of the suit, that there had been a failure to state a claim upon which relief could be granted, and that certain alleged indispensable parties had not been joined. The case was heard on November 23, 1959 by the three-judge court on the pleadings of appellants and the motion to dismiss.

On December 21, 1959, in a per curiam opinion, the three-judge court dismissed the action on the ground that it could not intervene to grant the relief prayed for, stating however:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay." R 219.

On February 4, 1960, an order dismissing the complaint was entered by the District Court on the grounds that the court lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted. This appeal is from the final order, pursuant to 28 U.S.C. § 1253. Probable jurisdiction was noted November 21, 1960.

SUMMARY OF ARGUMENT

I

The Tennessee Constitution creates a system of proportional representation in both houses of the state legislature distributed by voting population in the counties and districts, and gives each qualified citizen an equal vote. Under the constitutional formula, this

is a measureable equality in voting rights and representation. To keep the equality current, there is a further constitutional provision requiring an enumeration of voters and reapportionment of the legislature every ten years.

The legislature has affirmatively, purposefully, and systematically nullified this voting right of appellants by adoption and maintenance of the Act of 1901 as the basis for apportionment and elections. When adopted and since, the Act was not based on the required enumeration of the qualified voters and has ignored the actual number of qualified voters in assigning among the counties and districts representation in both houses of the legislature. Since 1901 the legislature has defeated all proposals for the required enumerations and reapportionments.

The result has been to give to about ⅓ of the total voters, located in certain favored areas, the privilege of electing and controlling ⅔ of the membership of the state legislature. The geographic segregation of voters has meant that the voters in the less favored areas of the state have on the average a vote of about 1/10 the value of the votes of the most favored voters.

The Act of 1901, at the time of its adoption and since, violated all principles of reasonable classification of voters and has been openly and on its face the clearest sort of denial of equal protection of the laws under the Fourteenth Amendment. Not only is the Act discriminatory on its face in its departure from the standards of the state constitution, but it is without justification as a reasonable classification of voters and representatives, because the superior commands of the state constitution deprive the legislature of any discretion to classify voters in relation to seats in the legislature

differently from the proportioning of the seats to the size of the voting population of the several counties and districts. Because the invidious discrimination is patent on the face of the statute, proof of the discrimination does not depend on proof of extrinsic circumstances. Nevertheless, appellants have shown a serious maladministration and pattern of practical discriminations against them and those similarly situated (in, for example, the distribution of state funds), which has flowed from the failure of equal voting rights and the resulting inadequate representation.

The segregation of voters and the dilution of their vote is no different from the discriminatory action which this Court has protected against when the discrimination was founded upon race. The inequality, purposefully begun, has systematically continued and worsened with the growth in population and the defeat in succeeding legislatures of all attempts to periodically re-examine and reapportion as required by the positive command of law.

The "political" nature of the right to vote in equality is no bar to its judicial vindication under the precedents of this Court. Unlike *Colegrove* v. *Green*, 328 U.S. 549, this is not a case in which it can be argued that political judgment or discretion has been conferred upon the legislature to order its conception of balance between representation and voting rights. In this case the violation of appellants' federal rights to equal protection of the laws is unmistakeable and measureable by approximate mathematical standards provided by law.

In this case, unlike *Colegrove*, there is no alternative to judicial assistance if the doors to relief are to be unlocked. For 60 years reapportionment bills have

been deliberately defeated by the representatives of the over-represented minority. Messages from governors have fallen on deaf ears. The Tennessee Supreme Court, fully aware of the denial of the appellants' rights, has refused relief on the ground that it would destroy the state government. There is no initiative or referendum in Tennessee. Further constitutional change is closed off because it is controlled by the unrepresentative legislature. This Court is appellants' last and only hope if appellants' federally assured rights are to be vindicated.

Jurisdiction exists, as this Court held in *Smiley* v. *Holm*, 285 U.S. 355, and as a majority of the participating members of the Court held in *Colegrove*. The Court is not called on to "re-map" the state, or to hurriedly provide relief in the face of an impending election. The Court can hardly do less than agree with the District Court that there has been a "clear violation" of the rights of the appellants and that "the evil is a serious one which should be corrected without further delay." The Court has the opportunity and the duty to clarify its earlier decisions for the District Court so that it can provide the necessary relief in this voting rights case.

II

For achieving corrective action, appellants have kept practical considerations in mind and suggest a step-by-step approach, which does not involve an assumption by the District Court of legislative duties or responsibilities.

The first step would be a remand to the District Court with directions to vacate the existing order, and enter an order denying appellees' motion to dismiss and retaining jurisdiction of the case. History has

shown that assertion and retention of jurisdiction by a court (federal or state) has provided the necessary spur to legislative consideration of the facts laid before the court and has produced the necessary corrective action (in Minnesota, New Jersey, and elsewhere). By assuming and retaining jurisdiction and providing the legislature the interim opportunity to reconsider and correct inequalities in voting and representation, the Court does not assume the legislative task, but merely exposes the deficiencies in relation to constitutional requirements and in effect remits the matter to the legislature for further action and revision.

If a point should be reached where the District Court would be called upon to do more than assume and retain jurisdiction while the legislature takes corrective measures, there are several steps which may be taken separately or together. One might be enjoining the state election officials, who are among the appellees, from holding any future election under the Act of 1901. Another, together with the injunction or apart from it, might be a declaratory judgment under the federal Declaratory Judgment Act declaring the invalidity of the Act of 1901.

These forms of equitable relief have been afforded in the past in vindication of voting rights. They are supported not only by the Civil Rights Acts, the federal Declaratory Judgment Act, and the Constitution itself, but have been underscored by the recent 1957 amendment of the Civil Rights Act which places special emphasis on protecting, with equitable or other relief, the right to vote. Either or both remedies of injunction and declaratory judgment are certain to evoke the necessary corrective action by the Tennessee legislature, if the additional spur is needed.

If it is necessary for the District Court to consider further steps should the expectation of adequate response by the legislature not be realized, there are two additional alternatives for the District Court. Thus, if a further election is enjoined under the Act of 1901 and the legislature has not provided an adequate reapportionment in time for the next election (in 1962), the Court, taking judicial notice of any Tennessee enumeration (if made) or the 1950 or 1960 federal census of voting population, could itself, or through a master, apply the mathematical formula of the Tennessee Constitution to provide an apportionment under which the election officials may conduct the next election. Alternatively, the Court could direct the election officials to conduct the next election at large.

Either measure would be temporary and would contemplate that the legislature next elected would provide a suitable apportionment, measured by the state constitutional formula, before the District Court would relinquish jurisdiction of the case. The use of the constitutional formula most nearly resembles what the state constitution contemplates; but the state constitution also supports an election at large as an alternative temporary expedient since the legislature under the state constitution is "dependent upon the people" of Tennessee. On a like basis, this Court and others have supported elections at large when reapportionments have failed. If it should be needed, an election under the constitutional formula or at large would be a workable, sensible remedy since either would immediately and approximately restore appellants voting rights pending a valid reapportionment by the legislature.

Appellants emphasize that the steps suggested are progressive and not simultaneous steps, and that the

necessary and desired relief is likely to be achieved in the very first stage with the retention of jurisdiction. Each of the steps is designed to give meaning to the point that ultimate responsibility for providing adequate voting rights and representation through a proper apportionment statute rests with the legislature acting in accordance with state and federal constitutional requirements.

ARGUMENT

I

UNDER THE SYSTEM OF PROPORTIONAL REPRESENTATION AND EQUAL VOTING ORDAINED BY THE TENNESSEE CONSTRUCTION, THE UNAUTHORIZED PURPOSEFUL AND SYSTEMATIC DISCRIMINATION AGAINST APPELLANTS, WHICH DISTORTS AND REDUCES THEIR RIGHTFUL REPRESENTATION IN THE STATE LEGISLATURE, DENIES THEM A FULL VOTE IN EQUALITY WITH OTHER VOTERS AND IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

A. The Constitution of Tennessee Provides A Measurable Equality of Voting Rights and Representation

The people of Tennessee in their Constitution of 1870 provided for a system of proportional representation in the state legislature and for free and equal elections, whereby the members of both houses would be responsive to the popular will and the members of the voting population would enjoy a general equality in expressing their will. Seats in both houses of the legislature were to be apportioned among the several counties and districts in proportion to the ratio of the

voting population of each to the total voting population of the state. A maximum number of 99 members for the House and 33 members for the Senate was provided and early reached, in 1880.

It was not expected that there would be one-for-one mathematical exactness in apportioning the membership of the legislature. For example, it was provided that a county with two-thirds of the voting population requisite for one seat in the House would be entitled to the one seat.

Nevertheless it was clearly contemplated that overall representation should, as nearly as possible, approximate relative voting population. Thus, to the extent that some counties might lose fractions of House seats in the calculations (by virtue of the two-thirds minimum seating rule above, or otherwise), it was provided that in apportioning senators among the different counties the fraction that may be lost by any counties should be made up to them in Senate representation as nearly as practicable. Tenn. Const. Art. II, sec. 6.

This intention to measure representation against voting population was specifically buttressed by the Declaration of Rights, that all power is inherent in the people, and that there shall be equality in the right of suffrage, Tenn. Const. Art. 1, secs 1 and 5; and by the provision of Article II sec 3, that the legislative authority of the state shall be vested in a General Assembly, consisting of a Senate and House of Representatives, "both dependent on the people."

To insure that the intention be implemented, the Tennessee Constitution further provided that within every ten years after 1871, an enumeration of the qualified voters and an apportionment of the representatives in the legislature shall be made.

Thus the system of government ordained for Tennessee, and expressed in its Constitution, was one representative of the people of the whole state with substantial equality of voting rights vested in the people statewide, in order to maintain direct responsiveness of the legislature to the majority will of the people.

B. The Denial of Equality of Voting Rights Is Patent, And Has Been An Affirmative, Purposeful, and Systematic Denial of Equal Protection of the Laws.

Following the adoption of the Tennessee Constitution in 1870, only three of the required decennial reapportionments were made, the last by the Act of 1901. This Act was itself violative of the organic law because an enumeration of the qualified voters was not made (though there was a proposal to refer to the federal census of 1900, R 138) and the actual number of qualified voters as disclosed by the census was ignored by assigning less seats to eleven counties entitled to more (R 232). Since 1901 no further reapportionments have been made, despite all efforts to obtain legislative action, and despite the growing distortion, in the intervening years, between population in certain geographic areas and representation of that population under the apportionment of 1901. The result (Statement of Case, supra) is a legislature two-thirds of whose members are chosen by one-third of the total voters, located in certain favored areas, and the reduction of the contemplated equal votes of the other two-thirds of the voters to a fraction of their intended worth, on the average, in comparing votes by counties, at about one-tenth the value of the votes of the most favored voters.

There was no basis for this discriminatory classification in 1901 or since. The only true and authorized

basis for classification of voters and the derivative representation of them in the legislature under the Tennessee Constitution was ignored, and continues to be ignored, by the succession of Tennessee legislatures who, from 1901 forward, have deliberately and systematically maintained the inequality.

This is the clearest sort of denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution since the statute which is the source of the forbidden discrimination, when compared with the commands of the organic law of Tennessee, is patently and on its face discriminatory against appellants and an overwhelming majority of the voters, and does not depend on proof of extrinsic circumstances (as in *Neal* v. *Delaware,* 103 U.S. 370, 394), or discrimination or inequality in adminstration (as in *Yick Wo* v. *Hopkins,* 117 U.S. 356, 373-374), to demonstrate that it violates the equal protection of the laws provision of the Fourteenth Amendment. See discussion of the cases in *Snowden* v. *Hughes,* 321 U.S. 1, 8-10. The continued systematic discrimination over 60 years has served to aggravate the forbidden inequality under the federal constitution.[33]

That a serious mal-administration, and pattern of

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[33] In testimony handed up as a supplemental brief by plaintiffs in *Magraw* v. *Donovan,* 159 F. Supp. 901 (D.C. Minn. 1958), 163 F. Supp 184, 177 F. Supp. 803, where the District Court took jurisdiction in a situation involving Minnesota voters similar to this case, Dr. William Anderson, Professor Of Political Science Emeritus of the University of Minnesota, said of the case development under the Fourteenth Amendment: "It is significant, however, that the equal protection principle was extended to an important political right, the right to vote, and that the right to equality in voting for legislative members is exactly the right that is involved in apportionment cases."

practical discriminations against appellants and those similarly situated, has in fact flowed from the failure of equal voting rights and the resulting inadequate representation has nevertheless been set forth in examples by the appellants and not denied by the appellees (Statement of Case, supra), as a means of showing why the impairment of appellants' voting rights is an evil which, as the District Court agreed, "is a serious one which should be corrected without further delay". R. 219.[34]

Not only is the Act of 1901 discriminatory on its face in its departure from the standards of the state constitution, but it is devoid of any justification as a reasonable classification of voters and representatives,[35] because the superior commands of the state constitution deprived the legislature of any discretion to classify voters in relation to the seats in the legislature differently from the proportioning of the seats

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[34] "Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayers is distributed, and the power to make and measure the levy of taxes, are so essential, all-inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the vitals of democracy itself." *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315, 321 (1931).

[35] Mr. Justice Frankfurter has said that classification by the state must be "rooted in reason", *Griffin* v. *Illinois*, 351 U.S. 12, 21 (concurring opinion); and Mr. Justice Jackson has said that equal protection "requires that classification rest on real and not feigned differences", *Walters* v. *City of St. Louis*, 347 U.S. 231, 237.

to the size of the voting population of the several counties and districts.

The disparity in voting rights effected by the succession of Tennessee legislatures has thus denied to appellants a full vote in equality with other voters of Tennessee, without even the semblance of justification which a majority of this Court may have thought was present in *South* v. *Peters*, 339 U.S. 276. There, it will be recalled, the lower federal court had decided under the Georgia constitution that there was no guarantee of a substantially equal vote in elections and the dismissal of the suit to set aside the Georgia county unit vote in a primary election for United States senator was upheld. The instant case is the opposite, in that the Tennessee Constitution requires and guarantees a substantially equal vote, and the lower federal court plainly said that this right is being denied unlawfully to appellants by the Tennessee legislature (R 219.).

Nor is there absent in this case the objective measure for equality, which some of the members of this Court may have thought was absent in *Colegrove* v. *Green*, 328 U.S. 549, for here the Tennessee Constitution has provided a mathematical formula by which to measure representation and equality in voting, but which the Tennessee legislature deliberately ignores.

The inequality practiced in this case was effected by geographically segregating appellants and other voters in the same areas of the state from favored voters and areas, and discriminating against the former by diluting the value of their votes in comparison with the favored voters.[36] This inequality, unlike that in *Cole-*

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[36] In *Gomillion* v. *Lightfoot*, 364 U.S. 339, Mr. Justice Whittaker was of the view (concurring opinion) that the conduct of the state

grove v. *Green, supra,*[37] began with affirmative discriminatory action of the legislature in 1901[38] and was purposefully and systematically continued and worsened by the defeat in succeeding legislatures of all attempts to periodically re-examine and reapportion, as required by positive command of law, R 126-160.

This course of discriminatory action has caused a denial of the equal protection of the laws to appellants exactly as if the discrimination had occurred because of race. As stated by a minority of this Court in *South* v. *Peters,* 339 U.S. 276:

> "It is said that the dilution of plaintiff's votes . . . is justified. . . . If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon,* which have insisted that where there is voting there be equality. . . . [T]here shall be no inequality in voting power

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in "fencing out" a group of Negro citizens from voting in municipal elections was an unlawful segregation in violation of the equal protection clause of the Fourteenth Amendment, rather than the abridgment of the right to vote under the Fifteenth Amendment found by the rest of the Court.

[37] In *Gomillion* v. *Lightfoot, supra,* this Court in describing *Colegrove* said that the disparity in districts "came to pass solely through shifts in population" and that "The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords."

[38] The Act of 1901 was not based on a fresh enumeration of qualified voters, though it was proposed that the 1900 federal census be used, R 138-139. Actually, the 1900 census was disregarded, and as a result the voters in eleven counties were given less representation than they were entitled to, R 232.

by reason of race, creed, color, or other invidious discrimination." 339 U.S. at 281.

Geographic discrimination and racial discrimination are equally onerous.[39] Although the federal constitution does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves, *Minor* v. *Happerset,* 88 U.S. (21 Wall.) 162; *McPherson* v. *Blacker,* 146 U.S. 1, nonetheless, where state law grants such a right, each citizen must be equally protected in the operation of that law. *United States* v. *Reese,* 92 U.S. 214; *United States* v. *Cruikshank,* 92 U.S. 542. The Tennessee Constitution grants the full right of suffrage to appellants. There can be no dilution by the state of that right to vote through the medium of fractional representation for certain voters and full representation for other voters.[40]

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[39] "The Supreme Court has stricken many attempts to discriminate in elections because of race, creed or color. . . . A classification which discriminates geographically has the same result. . . . Any distinction between racial and geographic discrimination is artificial and unrealistic. Both should be abolished." *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220, 236 (D.C. Hawaii, 1956), reversed because question was mooted by corrective action of Congress. 256 F. 2d 728 (9th Cir. 1958).

[40] *Ex Parte Siebold,* 100 U.S. 371; *Ex Parte Yarbrough,* 110 U.S. 651; *United States* v. *Mosley,* 238 U.S. 383; *Nixon* v. *Herndon,* 273 U.S. 536; *United States* v. *Saylor,* 322 U.S. 385; *United States* v. *Classic,* 313 U.S. 299; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461.

The deprivation of right from dilution of the ballot is aptly phrased in *State ex rel South St. Paul* v. *Hetherington,* 240 Minn. 298, 61 N.W. 2d, 737 (1953) where the Minnesota Supreme Court stated that: "The right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self-government. Fundamental rights may be lost

Otherwise, and this is now the case in Tennessee, an elective franchise to all intents and purposes is lost. An unequal voice in elections and a complete denial of participation in an election are of the same offensive order.

C. Notwithstanding Its "Political" Nature, The Measurable Right To Equality In Voting Denied In This Case Is Protected By The Fourteenth Amendment—Colegrove Distinguished.

The Fourteenth Amendment has been a constant protector of voting rights against discriminatory state action notwithstanding the objection that the subject matter is political. In *Nixon* v. *Herndon,* 273 U.S. 536, the Court held that Texas legislation prohibiting Negroes from participating in a primary election directly contravened the Fourteenth Amendment. Said Mr. Justice Holmes, speaking for the Court:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action when it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over 200 years. . . .
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> ". . . We find it unnecessary to consider the 15th Amendment because it seems to us hard to imagine a more direct and obvious infringement of the 14th. . . . What is this but declaring that the law

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by dilution as well as by outright denial. To whatever extent a citizen is disenfranchized by denying him reasonable equality of representation, to that extent he endures taxation without representation, and the democratic process itself fails to register the full weight of his judgment as a citizen."

in the states shall be the same for the black as for the white, that all persons, whether colored or white, shall stand equal before the laws of the states. . . ." 273 U.S. at 540, 541.[41]

Mr. Justice Frankfurter, citing this view in answer to the "political" subject matter objection in a related situation under the Fifteenth Amendment in *Gomillion* v. *Lightfoot, supra*, observed on behalf of the Court, that a statute which is alleged to have worked an unconstitutional deprivation of rights is not immune to attack simply because the mechanism employed by the legislature is a definition of local boundaries.

The situation condemned in *Gomillion* may not have been the same situation permitted to stand in *Colegrove* v. *Green* (as Mr. Justice Frankfurter went on to add); nevertheless *Colegrove* did not pass upon or decide the situation in the case at bar, which presents the unmistakeable violation (recognized by the District Court below) of the appellants' federal rights to equal protection of the laws in the exercise and enjoyment of their voting rights. Unmistakeable because the discrimination, affirmatively and purposefully undertaken by the legislature in 1901, and systematically continued and extended, is unclouded by doubts that discretion may have been confided in the legislature to make a "political" judgment favoring unbalanced voting rights, or doubts as to the standard or measure by which to recognize and remedy the inequality of voting rights. Thus, in *Colegrove*, there was no mandatory requirement of a state constitution

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[41] See also, *Snowden* v. *Hughes*, 321 U.S. 1, 11; *McPherson* v. *Blacker*, 146 U.S. 1; *Coleman* v. *Metter*, 307 U.S. 433; *Nixon* v. *Condon*, 286 U.S. 73.

for apportionment or requirement in federal law for congressional districts of approximately equal population. The Court relied on *Wood* v. *Broom*, 287 U.S. 1, which held that the standards for nearly equal, compact, and contiguous districts earlier required in the 1911 districting act, had been dropped by Congress when it adopted the controlling 1929 redistricting act. In fact the prevailing opinion in *Colegrove* indicated that this was, by itself, sufficient reason to decide against the plaintiffs in *Colegrove*, 328 U.S. at 551.

Whatever may have been the violation in *Colegrove* or the doubts of some of the justices concerning it, here the violation is affirmative, patent, measurable, and leaves no room for doubt. Unlike *Colegrove* there is no alternative to judicial assistance if relief is ever to be obtained. There the door to legislative relief, including relief by the Congress of the United States, appeared to be open; here it is sealed tight as demonstrated by 60 years of deliberate defeat of the required reapportionments by the over-represented minority, the support by the Tennessee Supreme Court of this disobedience of superior law, and the control by the unrepresentative legislature of the machinery for further constitutional change. (See Statement of Case, supra pp. 14-15.) In *Colegrove* there seemed to be reasons, for some of the Court, to withhold the granting of equitable relief.[42] Here there is not only jurisdic-

[42] A majority of four (of seven) members of the Court in *Colegrove* v. *Green* were of the view that the federal courts had jurisdiction to provide a remedy and three of the four would have granted relief; but because he thought on the facts that discretion to withhold the equity remedy should be exercised, the fourth member voted with the three other members, who thought the remedy

tion,[43] but no necessity for a court to "affirmatively re-map" the state.[44] Here there are no special circumstances, such as impendency of an election (the next for Tennessee is 1962) or the delicacy of relations with Congress; and most importantly there is present what may have been missing for some in *Colegrove,* namely the clearly visible violation of law and the means built into local organic law for applying and measuring a judicial remedy that does not require judicial activity in the legislative field.

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should be provided by political process without judicial help, to constitute a majority which affirmed dismissal of the suit.

As Mr. Justice Rutledge said of *Colegrove* in *Turman* v. *Duckworth,* 329 U.S. 675, 678: "A majority of the Justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."

It is fair to say, therefore, that this Court did not hold in *Colegrove* that it lacked jurisdiction, but rather that it ought not inject a judicial remedy where the existence of a legal wrong is unclear. Even before *Colegrove,* it was established that this Court could and would reject a clearly invalid state apportionment statute, and in the absence of a valid apportionment, assure voting rights by election at large, *Smiley* v. *Holm,* 285 U.S. 355.

[43] *Smiley* v. *Holm,* 285 U.S. 355; *Turman* v. *Duckworth,* 329 U.S. 675, 678; and see note 42, supra. See also, *Leser* v. *Garnett,* 258 U.S. 130.

[44] The possibility of having to "affirmatively re-map the Illinois districts" seemed to have been a concern expressed in *Colegrove* v. *Green,* 328 U.S. 549, 553.

II

THE DENIAL OF VOTING EQUALITY IN TENNESSEE MUST BE TERMINATED, AND CAN BE ENDED WITHOUT USURPATION OF LEGISLATIVE PREROGATIVES OR DIFFICULTY, THROUGH THE USE OF ONE OF MORE OF SEVERAL MEANS OF JUDICIAL RELIEF.

A. The First Step—Retention Of Jurisdiction By The District Court

In achieving corrective action, appellants have been mindful that *Colegrove* v. *Green* indicated the concern of this Court for practical considerations when relief is sought in cases involving voting rights. Nevertheless, from actual experience, it is quite likely that voting inequality can be terminated in Tennessee without encountering the difficulties anticipated in that case.

For this purpose appellants feel that a step-by-step approach, utilizing certain alternative forms of relief is both feasible and important.

The first step would be a remand to the District Court with directions to: (1) vacate the existing order, and (2) enter an order denying appellees' motion to dismiss and retaining jurisdiction of the case. Whatever else this Court may add will be important, but if it did no more at this stage, there is every reason to believe from history and experience, that the assertion and retention of jurisdiction by the District Court will provide the necessary spur to legislative action, which has been missing and sorely needed in this case.

In *Magraw* v. *Donovan,* this is precisely what was done by the federal District Court in Minnesota, and the desired result followed. The court declined to ac-

cept the contention that reapportionment was not a justiciable issue and convened a three-judge court to hear the merits of the matter, 159 F. Supp. 901 (D.C. Minn. 1958). The three-judge court retained jurisdiction pending the 1959 session of the Minnesota legislature, saying in a per curiam opinion (163 F. Supp. 184, 187-188):

> "Here it is the unmistakeable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. Minnesota Constitution, Article 4, Sections 2 and 23; *Smith* v. *Holm,* supra, at page 490 of 220 Minn., 19 N.W. 2d 914; *State ex rel. Meighen* v. *Weatherhill,* supra, page 341 of 125 Minn., 147 N.W. 105. Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been presented to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to re-district.' *Smith* v. *Holm, supra,* at page 490 of 220 Minn., at page 916 of 19 N.W. 2d.
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> "It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly

and deliberately failed and refused to perform its constitutional duty to redistrict the State.

"The Court retains jurisdiction of this case. Following adjournment of the 61st Session of the Minnesota Legislature, the parties may, within 60 days thereafter, petition the Court for such action as they, or any of them, may deem appropriate."

Thereafter, at the 1959 session the legislature enacted a new apportionment act as a result of which the litigation was dismissed, 177 F. Supp. 803 (1959).

A similar result was achieved by the District Court for Hawaii in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (DC Hawaii 1956).[45] There the court denied a motion to dismiss a suit attacking the districts of the territorial legislature, unchanged since 1901, as in violation of the Fourteenth Amendment and the reapportionment provision of the Hawaii Organic Act, and seeking an injunction to require an election at large. After trial the judge announced orally his decision to grant the requested relief. The Congress made further action unnecessary by amending the Organic Act to provide new districts and transferring future authority to the governor supervised by the territorial supreme court.[46]

Some of the state courts have adopted a similar approach to the problem. The most recent was in the New Jersey Supreme Court in *Asbury Park Press* v. *Woolley*, 33 N.J. 1, 161 A2d 705 (1960). This was a suit for declaratory judgment and injunctive relief claiming failure of the legislature to reapportion under the state constitutional requirement. Reversing

[45] Reversed on other grounds, i.e. because question was mooted by corrective action of Congress, 256 F. 2d 728 (9th Cir. 1958).

[46] The account is set out in Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1088-1089 (1958).

a lower court dismissal (which had held the matter was solely for the legislature), the Supreme Court retained jurisdiction and postponed a decision on the merits in order to give the legislature meeting in 1961 the opportunity to take corrective action by adoption of a reapportionment act. In response to the argument that its judging the existing apportionment to be violative of the state constitution would cause chaos and anarchy and disrupt the state government, the court said that a judiciary conscious of its oath to support the constitution "cannot accept the *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature." On February 1, 1961, the New Jersey legislature adopted and the Governor approved a reapportionment act.[47]

The New Jersey Supreme Court, in collecting the authorities, called attention to the fact that as far back as 1938 the courts of twenty-two states had either exercised the power or stated they had the power to review reapportionment acts upon constitutional grounds; and singled out as examples of compliance by the legislature, once the judiciary had found an apportionment act invalid, the two *State* v. *Cunningham* cases, 83 Wis. 90, 53 NW 35 (1892) and 81 Wis. 440, 51 NW 724 (1892), which reveal that twice in one year the Wisconsin Supreme Court declared successive apportionment acts invalid and the legislature responded with a third act which proved to be valid.

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[47] N.Y. Times, Feb. 2, 1961, pp. 1 and 16.

B. No Assumption Of Legislative Functions By The Court

By assuming and retaining jurisdiction and providing the legislature an opportunity to reconsider and correct the inequalities in voting and representation the court does not assume legislative tasks. The same is true at the point when the court expressly decides on the merits, if it is so required, that the apportionment is invalid. In the first case, on a prima facie showing, and in the second case, on a full showing [48] and finding, the court simply exposes the deficiency in relation to constitutional requirements, and in effect remits the matter to the legislature for further action and revision, just as the court remands an erroneous order of an administrative agency for further action. In neither case does the court redraft the statute or the order. Disapproval of the statute returns the matter to the legislature. As Mr. Justice Frankfurter said, in *Niemotko* v. *Maryland,* 340 U.S. 268, 285 (concurring), "A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate" to satisfy the Fourteenth Amendment.

C. Injunction, Declaratory Judgment

Assuming that a point might be reached where the District Court would be called upon to do more than retain jurisdiction and afford the legislature the opportunity to take corrective measures, there are several

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[48] In this case the necessity of a hearing on the merits concerning the violation may be academic, since the violation has never been denied, the defenses have been jurisdictional, and, because the wrong is patent, the District Court has already expressed the view tantamount to a finding that there has been "a clear violation . . . of the rights of the plaintiffs." R 219.

steps, well within the recognized powers of the court, that may be taken separately or together.

As the District Court below made clear, we are dealing here with the deprivation of voting rights of individuals, and the precedents support vindicating such rights by injunctive relief or by declaratory judgment, or both. Useful examples are *Terry* v. *Adams*, 345 U.S. 461; *Smiley* v. *Holm*, 285 U.S. 355; *Hawks* v. *Smith* (No. 1), 253 U.S. 221; *Rice* v. *Elmore*, 165 F 2d 387 (4th Cir. 1947), cert. denied 333 U.S. 875.

These remedies rest not only on the Civil Rights Act, 42 U.S.C. 1983, in conjunction with 28 U.S.C. 1343(4), and the federal Declaratory Judgment Act, 28 U.S.C. 2201-02; but equitable relief from an unconstitutional act can be based directly upon the federal constitution, *Ex parte Young*, 209 U.S. 123; *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579. It is noteworthy that the Congress specifically reinforced the means for providing equitable relief in voting rights cases by enacting, as a separate title, Part III of the Civil Rights Act of 1957, to wit, 28 U.S.C. 1343 (4), which states that the District Court shall have original jurisdiction of any civil action:

> "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" [emphasis added]

The Civil Rights Act of 1960 defines the word "vote" to include "all action necessary to make a vote effective". 74 Stat. 91. Both Acts add impetus for judicial assistance rather than judicial reluctance in using equitable jurisdiction to protect voting rights. Borrowing from another situation, "it is fair to say that in all this Congress expressed a mood . . . not merely by oratory, but by legislation." *Universal Camera Corp.*

v. *National Labor Relations Board,* 340 U.S. 474, 487.

It is therefore suggested, that if the need should arise, the District Court could enjoin the state election officials from holding any future election under the Act of 1901. This avoids action directly against the state legislature, but is in keeping with the proposition that:

> "... The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State's government ... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Cooper* v. *Aaron,* 358 U.S. 1, 16-17.

Such an injunction, in our view, is almost certain to evoke the necessary action by the Tennessee legislature, if the additional spur is needed to prompt the enactment of the required reapportionment. Jurisdiction, of course, would be retained until suitable action was taken.

In connection with an injunction against further use of the Act of 1901 as the basis for future elections, the court could, if it chose, issue a declaratory judgment declaring the invalidity of the Act of 1901. This in tandem with the injunction, or even by itself, would have the same stimulating effect in achieving reapportionment by the legislature, as would the injunction alone. Nevertheless, if the injunction were to be used, there would seem to be no real necessity for a declaratory judgment.

D. Kidd v. McCanless Placed In Proper Perspective

However, apart from a declaration being surplusage, if it is said that the federal court may not use a declaratory judgment in this case because of the Tennessee Supreme Court decision in *Kidd* v. *McCanless,* 200 Tenn. 282, 292 S.W. 2d 40 (1956) appeal dismissed 352 U.S. 920, it is worth noting certain facts. The *Kidd* case held only that a declaratory judgment under Tennessee law, if applied to declare the apportionment Act of 1901 unconstitutional, would deprive Tennessee of the existing legislature and the means of electing a new one and bring about the destruction of the state, R 65. This was the only point decided and the Tennessee Supreme Court made this clear in denying the petition for rehearing, R 67.[49] It never reached the questions in this case.

The *Kidd* case therefore did not decide the efficacy of the federal Declaratory Judgment Act as a remedy; and even if it had, the state court's view on the application of a federal statute and federal remedy to vindicate a federally protected right would not be dispositive or binding on this Court, *United States* v. *Allegheny County*, 322 U.S. 174, 183. This Court may therefore take its own view of the matter.[50]

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[49] The United States Supreme Court dismissed the appeal in a per curiam notation, 352 U.S. 920, simply citing *Colegrove* v. *Green*, 328 U.S. 549, and *Anderson* v. *Jordan*, 343 U.S. 912, also a per curiam dismissal which relied on *Colegrove*.

[50] Even if the remedy were a matter of state law that stood in the way of dealing with the federal question, this Court has held it is within its province to inquire whether the decision of the state court rests upon a fair and substantial basis, and if it does not to decide the constitutional question, *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282. Where a United States district court and the Supreme Court have jurisdiction because questions are raised

In the first place, strictly speaking, the de facto or de jure status of the members of the legislature is not reached in this challenge of the existing apportionment act (by declaration or otherwise). The attack is not aimed as an ouster of the members of the legislature or a challenge of their right to sit. Each house of the legislature is itself the judge of the qualifications and election of the members of each, Tenn. Const., Art II, sec 11, and the Tennessee courts will not intervene, *State* v. *Shumate,* 172 Tenn. 451, 454-455, 462-463; *Gates* v. *Long,* 172 Tenn. 471. The attack is against the continued use, in the future, of the Act of 1901 as the basis for choosing members of succeeding legislatures.

In the second place, even if there is a question concerning status of the legislature, functioning under the invalid apportionment act, to enact the corrective apportionment act, the weight of authority and reason support the view that the members of the legislature are de facto officers and the corrective act is valid. *Matter of Sherrill* v. *O'Brien,* 188 N.Y. 185, 81 N.E. 124 (1907); *Lang* v. *Bayonne,* 74 N.J.L. 455 (E. and A. 1907); *Asbury Park Press* v. *Woolley,* 33 N.J. 1, 162 A. 2d 705 (1960); *State* v. *Carroll,* 38 Conn. 449, 9 Am. Rep. 409 (1871); *Parker* v. *State,* 133 Ind. 178, 31 N.E. 1114 (1892); *Denny* v. *State,* 144 Ind. 503, 42 N.E. 929 (1896); *State* v. *Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892); Id., 83 Wis. 90, 53 N.W. 35 (1892), *Jones* v. *Freeman,* 193 Okla. 554, 146 P. 2d 564, appeal dismissed and cert. denied 332 U.S. 717 (1943), and see Beaver v. Hall, 142 Tenn. 416, 433, 217 S.W. 649 (1920).[51]

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under the federal constitution, both may pass on all questions of state law so far as necessary to a decision, *United Fuel Gas Co.* v. *Railroad Commission,* 278 U.S. 300, 307.

[51] Contra, *Kidd* v. *McCanless,* supra; *Fesler* v. *Brayton,* 145 Ind. 71, 44 N.E. 37 (1896); *State* v. *Zimmerman,* 249 Wis. 101, 23 N.W.

The reasoning is founded in public policy.

This Court, which has come a long way from *Norton* v. *Shelby County*, 118 U.S. 425, to *Chicot County* v. *Baxter*, 308 U.S. 371, 374, to support the de facto doctrine, has every reason to support a rule and public policy which will assure that "the streams of legislation" do not "become poisoned at the source".[52]

In the third place, even if we were to assume, contrary to the weight of authority and reason, that *Kidd* v. *McCanless* is correct in its view that a judgment declaring the invalidity of the 1901 apportionment act would terminate the existing legislature, it would strike us that the District Court, fully conscious as it is of the needs and constitutional rights of the appellants and of the large majority of the people of Tennessee, could without difficulty balance the popular needs against the alleged impediment by the simple expedient of delaying entry of the final order or mandate to which appellants are entitled. This would serve notice on the legislature that it is obliged to act, without impairing its ability, as the Tennessee court sees it, to validly act.

E. An Election By Constitutional Formula Or At Large

The remedial steps outlined so far envision the adequate response of the legislature when the court advises, by one method or another, that the Act of 1901 is

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2d 610 (1946); *State* v. *Schnitzer*, 16 Wyo. 479, 95 P. 698 (1908); *Winnie* v. *Stoddard*, 25 Nev. 452, 62 P. 237 (1900).

[52] Chafee, Congressional Reapportionment, 41 Harv. L. Rev. 1015, 1016 (1929). As Lewis says (Legislative Apportionment and the Federal Courts), "Of what use is the right of a minority—or a majority, as is often the case in malapportioned districts—to apply persuasion if the very machinery of government prevents political change?" 71 Harv. L. Rev. 1057, 1097.

invalid and is no longer a basis for future elections. History reveals that this is what has happened in other states when the federal or state courts have acted, and there has been no collapse of state governments, despite the fears expressed for Tennessee by its high court.

If it is necessary to consider further steps, should the expectation not be realized, appellants in their pleadings have suggested two additional alternatives for the District Court. Thus, if any further election under the Act of 1901 is enjoined and the legislature fails to provide an adequate reapportionment in time for the next election (1962), the court, taking judicial notice of any Tennessee enumeration (if made) or the 1950 or 1960 federal census of voting population in Tennessee,[53] could itself, or through a master, apply the mathematical formula of the Tennessee Constitution to provide an apportionment under which the election officials may conduct the next election. Alternatively, the court could direct the election officials to conduct the next election at large.

Either measure would be temporary, and would envisage that the legislature next elected, under either expedient, would provide a suitable apportionment, measured by the state constitutional formula, before the court would relinquish jurisdiction of the case.

The use of the mathematical formula of the state constitution, with the slight adjustments needed, may present some incidental questions of judgment for the court or master. But this course, as a temporary substitute (until a legislature acts) would most nearly resemble what the state constitution contemplates.

An election at large, as the alternative temporary expedient, while not the primary contemplated method

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[53] *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892).

of voting for the legislature under the state constitution, is nevertheless grounded upon it, and is aided by precedents laid down by this Court and others.

In *Smiley* v. *Holm*, 285 U.S. 355, affecting Minnesota, and *Carroll* v. *Becker*, 285 U.S. 380, affecting Missouri, this Court invalidated improperly adopted reapportionment statutes of both states relating to congressional districts, and directed that representatives be elected from each state at large until new dist icts were created. Mr. Chief Justice Hughes, speaking for a unanimous Court, rested the election at large, in the absence of appropriate districting, on the provision of Article 1, section 2 of the Constitution of the United States which provides that members of the House of Representatives shall be chosen "by the people of the several states."

The Constitution of Tennessee is equally, if not more explicit. Article II section 3, provides that the General Assembly shall consist of a Senate and House of Representatives "both dependent on the people". Article I section 1 of the Declaration or Bill of Rights declares that "all power is inherent in the people"; and Article XI section 16 places this declaration on a high pedestal, beyond the reach of alteration by the legislature or other branches of the government, by providing that everything in the Bill of Rights is "excepted out of the general powers of government and shall forever remain inviolate".

These provisions provide the back-up when the usual processes for election by counties and districts fail, and render insubstantial the dicta in *Kidd* v. *McCanless* that "there is no provision of law" for an election at large of the legislature, R 61-62. Under the authority of *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282, and *United Fuel Gas Company* v. *Railroad Commis-*

sion, 278 U.S. 300, 307, see note 50 supra, there is nothing preventing, and compelling reason for, the District Court to apply the remedy of election at large, should it become necessary in order to effectuate appellants' rights.[54]

If needed, an election either at large or under the constitutional formula would be a workable, sensible remedy which would immediately and approximately restore appellants' constitutional rights pending a valid reapportionment by the General Assembly.

CONCLUSION

Appellants have brought to this Court a case and controversy where the federally guaranteed right of equal protection in their voting rights has been violated. The record shows that it is no longer reasonable to expect that those who benefit by the wrong, and who control the state legislature by reason of the unlawful apportionment, will of their own volition relinquish the advantage or terminate the control.

The Court has jurisdiction. There are no detracting factors present, which in earlier cases permitted room for discretion in granting or withholding relief. On the contrary, there are the compelling circumstances (1) that all other avenues of relief are blocked, unless this Court provides the impetus to unblock them; (2)

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[54] In this connection, the Virginia Supreme Court ordered an election at large "despite an explicit provision of the Virginia Constitution to the contrary", where the state's congressional districts were found to violate the provision of the state constitution requiring that the districts should contain an equal number of inhabitants as nearly as practicable. *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105 (1932). The state's representatives were chosen at large, and valid new districts were drawn before the election of the next Congress. See Lewis, 71 Harv. L. Rev. 1057, 1070.

the type of Fourteenth Amendment violation is one commonly relieved by this Court; and (3) the constitution of Tennessee contains the standards for providing the relief without any necessity for a court to "affirmatively re-map" the state.

This Court can hardly do less than agree with the District Court below, that there has been "a clear violation" of the rights of the appellants, and that "the evil is a serious one which should be corrected without further delay", R 219. In so doing, there is a duty to clarify its earlier decisions for the District Court so that the appearance is not maintained, as it was interpreted below, that there is some form of inviolable bar to giving relief in this voting rights case.

We opened the discussion of remedies with the thought that a step-by-step approach on the part of the District Court would achieve the necessary and desired relief, probably in the very first stage with the retention of jurisdiction. We adhere to that view, and trust that this Court will give the District Court the opportunity to set the process in motion.

However, we cannot overemphasize that each progressive step outlined, if it becomes necessary, does not involve an assumption by the District Court of legislative duties or responsibilities. Each step is designed to implement the point that the ultimate responsibility for providing adequate voting rights and representation through a proper apportionment statute is on the legislature of Tennessee, acting in accordance with state and federal constitutional requirements.

It is respectfully requested that the Court reverse the order of the District Court below with directions to

(1) vacate its order of dismissal,
(2) enter an order denying the motion of the appellees to dismiss, and
(3) retain jurisdiction of the case in accordance with the instructions for relief by this Court.

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APPENDIX A

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956):

§ 3-101. *Composition—Counties electing one representative each.*—

The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roan, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Summer, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E. S.) ch. 5, Section 1; 1881 (E. S.), ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Shan., Sec. 123; Acts 1919, ch. 147; Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

§ 3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

§ 3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901,

ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

§ 3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch, 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

§ 3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives. (Acts 1901, ch. 122, section 6; Shan., section 126a1; Code 1932, section 144.)

§ 3-106. *Joint representatives.*—The following counties, jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.
Second district—Sullivan and Hawkins.
Third district—Washington, Greene and Unicoi.
Fourth district—Jefferson and Hamblen.
Fifth district—Hancock and Grainger.
Sixth district—Scott, Campbell and Union.
Seventh district—Anderson and Morgan.
Eight district—Knox and Loudon.
Ninth district—Polk and Bradley.
Tenth district—Meigs and Rhea.
Eleventh district—Cumberland, Bledsoe, Sequatchie, VanBuren and Grundy.
Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.
Fourteenth district—Summer, Trousdale and Macon.
Fifteenth district—Davidson and Wilson.
Seventeenth district—Giles, Lewis, Maury and Wayne.
Eighteenth district—Williamson, Cheatham and Robertson.
Nineteenth district—Montgomery and Houston.
Twentieth district—Humphreys and Perry.
Twenty-first district—Benton and Decatur.
Twenty-second district—Henry, Weakley and Carroll.
Twenty-third district—Madison and Henderson.

Twenty-sixth district—Tipton and Lauderdale.
Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

§ 3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.
Second district—Sullivan and Hawkins.
Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.
Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.
Fifth district—Knox.
Sixth district—Knox, Loudon, Anderson and Roane.
Seventh district—McMinn, Bradley, Monroe, and Polk.
Eighth district—Hamilton.
Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.
Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.
Eleventh district—Marion, Franklin, Grundy, and Warren.
Twelfth district—Rutherford, Cannon, and DeKalb.
Thirteenth district—Wilson and Smith.
Fourteenth district—Sumner, Trousdale and Macon.
Fifteenth district—Montgomery and Robertson.
Sixteenth district—Davidson.

Seventeenth district—Davidson.
Eighteenth district—Bedford, Coffee, and Moore.
Nineteenth district—Lincoln and Marshall.
Twentieth district—Maury, Perry and Lewis.
Twenty-first district—Hickman, Williamson and Cheatham.
Twenty-second district—Giles, Lawrence and Wayne.
Twenty-third district—Dickson, Humphreys, Houston and Stewart.
Twenty-fourth district—Henry and Carroll.
Twenty-fifth district—Madison, Henderson and Chester.
Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.
Twenty-seventh district—Gibson.
Twenty-eight district—Lake, Obion, and Weakley.
Twenty-ninth district—Dyer, Lauderdale and Crockett.
Thirtieth district—Tipton and Shelby.
Thirty-first district—Haywood and Fayette.
Thirty-second district—Shelby.
Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

APPENDIX B

Federal Statutes Involved

28 U.S.C. §1343:

"Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983:

"Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"Proceeding in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

DECLARATORY JUDGMENTS ACT

28 U.S.C. § 2201

"Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202

"Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

APPENDIX C

UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants

v.

JOE C. CARR, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers is an organization composed of over 1200 municipalities located in each of the 50 states, and the District of Columbia. Each member city acts through its chief legal officer known either as a City Attorney, Director of Law, Corporation Counsel or by a similar title.

This Brief is filed pursuant to Rule 42(4) of the Rules of this Court. The members of the National Institute of Municipal Law Officers are political subdivisions of states, and this Brief is sponsored by their authorized law officers.

The issues presented in this case vitally affect all of the municipalities in the United States. Only by means of an equal vote in state elections can residents of these

municipalities assert the needs and the interests of modern, urban communities. Only by means of equal representation in state legislatures can these cities meet the challenges now before them. Because the instant case, if reversed, would provide that equality in Tennessee, the National Institute of Municipal Law Officers had filed this *Amici* brief.

With all other avenues of relief exhausted and closed, the member cities of the National Institute of Municipal Law Officers strongly urge the Court to take jurisdiction of this case, and to decide the great national issue here presented. It is an issue of transcendent importance to all Americans.

ARGUMENT

Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs,[1] political representation in the majority of state legislatures is 50 or more years behind the times.[2] Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population.[3] These demands will become

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[1] NIMLO L. Rev., Vol. 20, 82 (1957).

[2] *Ibid.* See also Council of State Governments, Book of the States, Vol. XII, 55 (1958).

[3] In 1947, residents of urban areas made up 59% of the United States population but elected only about 25% of the state legislators of the country. United States Conference of Mayors, *Government Of The People, By The People, For The People?* (1947)

even greater by 1970 when some 150 million people will be living in urban areas.[4]

The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states.[5]

In New York City, for example, 8 million people elect only 90 members of the state assembly while 7 million "upstaters" have 118 representatives.[6] Los Angeles County with a population of 4,151,687 has but one senator while the counties of Inyo, Mono, and Alpine, California with a total of 14,014 residents have the same representation.[7] Baltimore is limited to 6 state senators regardless of the size of its population, as is

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[4] United States Municipal News, Vol. 27, No. 9, May 20, 1960. The 1960 Census will show that of the 180 million population, well over 100 million live in cities, O'Hallaren, *A Fair Share For the Cities*, Reporter Magazine, November 12, 1959, Vol. XXI, 22-24.

[5] Lewis, *Legislative Apportionment and the Federal Court*, 71 Harv. L. Rev. 1057 (1958).

[6] Strout, *The Next Election is Already Rigged*, Harper's Magazine, November, 1959, Vol. 219, 37.

[7] *Ibid.* See also McHenry, *Urban* v. *Rural in California*, 35 National Municipal Rev. 350, 352 (1946); *Hearings Before the Subcommittee, Committee on Government Operations*, 85 Cong., 1st Sess., at 1165 (1959).

Philadelphia, which is also allowed only 6 senators, and Providence, Rhode Island, which may only elect one-fourth of the total number of state senators.[8] Portland, Oregon, which by 1950 had grown 230% in population since a 1910 reapportionment, has not as yet received a single additional state senator.[9] 175,000 persons in Dallas and Houston, Texas have about one representative in the state legislature while in the smaller counties of the state, 30,000 people have the same representation.[10]

Nor is the lack of urban representation confined only to larger municipalities in the United States. Although Burlington, Vermont contains 33,000 persons, it has one representative in the state senate, while the little town of Victory with a population of 48 also has one state senator.[11] Because Vermont is now operating under a system of apportionment set up 167 years ago,[12] one rural vote is equal to 600 city votes. In Connecticut, which allows each town one representative in the state house and towns of over 5,000 persons, two representatives, the largest city, Hartford (with a population of 116,000) receives the same representation as Colebrook, which has 547 persons, and Union which has

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[8] Law and Contemporary Problems, *Legislative Reapportionment*, Vol. 17, No. 2, 370-371 (1952).

[9] Council of State Governments, Book of the States, Vol. XII, 55 (1958): Neuberger, *Our Rotten-Borough Legislatures*, 86 Survey 53 (1950).

[10] Letter from H. P. Kucera, City Attorney of Dallas, Texas to the National Institute of Municipal Law Officers, June 14, 1960.

[11] *Op. cit., supra*, note 6, Strout, *The Next Election is Already Rigged* at 35.

[12] Council of State Governments, Book of the States, Vol. XII, 55 (1958).

261 residents.[13] The Connecticut House of Representatives was last reapportioned in 1818.[14]

Entirely too typical of the general state voting situation is Kansas, where half of the population lives in eight urban counties, which are represented by 8 senators and 17 representatives, while the other half of the state's population receives 32 senators and 108 representatives. The malapportionment in Michigan is also indicative. There, the largest senatorial district according to the 1950 census had 396,001 people while the smallest contained only 61,008, yet each district has a single senator.[15]

Because of such under-representation, municipal de-

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[13] *Op. cit., supra,* note 8, Law and Contemporary Problems, *Legislative Reapportionment* at 371; Editorial *Down-Trodden Majority,* New Republic Magazine, Vol. 141: 3-4, November 9, 1959. See also MacNeil, *Urban Representation in State Legislatures,* 18 State Government 59 (1945) where it is noted that discrimination was found in 31% of the 42 states studied, and only 17 cities out of the 67 cities studied were represented in proportion to their population.

[14] *Ibid.,* Law and Contemporary Problems, *Legislative Reapportionment.*

[15] Because of a 1952 amendment to the Michigan Constitution, there are now glaring variances in the ratio of population of the smallest Senatorial district to the other more heavily populated districts, some of which are as follows:

District	Population in 1950	Ration of District to Smallest District
13	270,963	4.5 to 1
18	333,498	5.5 to 1
21	352,980	5.8 to 1
4	364,026	6.0 to 1
12	396,001	6.5 to 1

Source: *Scholle* v. *Hare, et al.,* 360 Mich. 1, 104 N.W.2d 63 (1960), Plaintiff's Exhibit G, Pt. 1.

velopment is severely hobbled, and the pressing urgency now for cities and suburbs to fully provide for the needs of their hundreds of thousands of residents cannot be satisfied. The full effect of existing state legislative apportionment becomes apparent when one examines the manner in which state funds are often distributed to urban communities.

The grossly unfair distribution of tax benefits in Tennessee, as described in the Appellants' Jurisdictional Statement, is by no means unusual. In Colorado, the legislature doles out to the City of Denver a mere $2.3 million per year in school aid which must provide facilities and services for 90,000 children. By contrast, Jefferson County, Colorado, which is a semi-rural area gets $2.4 million for 18,000 pupils.[16]

Similarly in Pennsylvania, the legislature pays $8 a day for the care of indigent persons to all non-sectarian hospitals in the state with the exception of the city-owned Philadelphia General Hospital which has to provide such services at a yearly cost of $2.5 million.[17] Philadelphia also spends $26 million a year on its city highways, yet it receives only a $2 million apportionment from state taxes of which it contributed over $20 million.[18] San Francisco receives considerably less for its schools than do its neighboring counties, and there-

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[16] *Op. cit., supra*, note 6, Strout, "The Next Election is Already Rigged" at 37.

[17] *Ibid.* See also Muncipalities and the Law in Action (1946 ed.) 96.

[18] Statement of Mayor Richardson Dilworth, *Hearings before the Subcommittee of the House, Committee on Government Operations*, 85th Cong., 1st Sess., at 352 (1958) in which Mayor Dilworth also noted at 337 that until a redistricting of "rotten boroughs" occurred, the cities will continue to face the inability of the states to cope with the manifold problems of metropolitan areas."

fore city taxpayers provide for the education of children in other school districts throughout the state.[19]

Thus, in spite of the fact that city and suburban dwellers outnumber the citizens of rural communities, the rural voters, nevertheless, are overwhelmingly in control of state legislatures so that conservative thinking dominates the state legislative atmosphere and the state treasuries.[20] It is impossible for municipal administrators, therefore, to effectively cope with such staggering problems as slum clearance, the need for new schools, or urban development in this unfair and frustrating atmosphere.

Nearly every state constitution on its face provides for the periodic apportionment of state legislative seats on the basis of population.[21] Disregard for such constitutional commands is shocking to any observer, yet the majority of state legislators blandly ignore any pleas for reapportionment—just as the Tennessee legislature has in the instant case—because of the obvious loss of rural power which would accompany an equitable distribution of representation. This is so even though millions of urban residents are daily deprived of the representation which they deserve and which their circumstances clearly require.

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[19] *Hearings Before the Subcommittee, Committee on Government Operations*, 85th Cong., 1st Sess., at 1161 (1959).

[20] As graphically stated by Mayor Ben West of Nashville, Tennessee, "the State is being ruled by the hog lot and the cow pasture." NIMLO L. Rev., Vol. 20, 83 (1957). The City of Portland, Maine has received little or no consideration from the state legislature when it has attempted to sponsor legislation. Letter from Barnett I. Shur, Corporation Counsel of Portland, Maine to the National Institute of Municipal Law Officers, June 13, 1960.

[21] Council of State Governments, Book of the States, Vol. XII, 52-56 (1958).

The courts of at least twenty states have exercised the power or have stated that they possessed the power, to review legislative reapportionment acts upon constitutional grounds. Recognition of the judicial burden to invalidate legislative action exceeding the boundaries of the authority delegated by a state constitution has been accepted in the following cases: *Shaw* v. *Adkins,* 202 Ark. 856, 153 S. W. 2d 415 (1941); *Armstrong* v. *Mitter,* 95 Colo. 425, 37 P. 2d 757 (1934); *Moran* v. *Bowl y,* 347 Ill. 148, 179 N. E. 526 (1932); *Parker* v. *Powell,* 133 Ind. 178, 33 N. E. 119 (1892); *Parker* v. *State,* 133 Ind. 178, 32 N. E. 836 (1896); *Denny* v. *State,* 144 Ind. 503, 42 N. E. 929 (1896); *Brooks* v. *State,* 162 Ind. 568, 70 N. E. 980 (1904); *Stiglitz* v. *Schardien,* 239 Ky. 799, 40 S. W. 2d 315 (1931); *Atty. General* v. *Suffolk County Commissioners,* 224 Mass. 598, 113 N. E. 581 (1916); *Donovan* v. *Suffolk County Commissioners,* 225 Mass. 55, 113 N. E. 740 (1916); *Merrill* v. *Mitchell,* 257 Mass. 184, 153 N. E. 562 (1926); *Hough' n County* v. *Blacker,* 92 Mich. 638, 52 N. W. 951 (1892); *Giddings* v. *Blacher,* 93 Mich. 1, 52 N. W. 749 (1892); *Williams* v. *Secretary of State,* 145 Mich. 447, 108 N. W. 749 (1906); *Barrett* v. *Hitchcock,* 241 Mo 433, 146 S. W. 40 (1912); *Rogers* v. *Morgan,* 127 Neb. 456, 256 N. W. 1 (1934); *People* v. *Kings County,* 138 N. Y. 95, 33 N. E. 827 (1893); *Sherrill* v. *O'Brien,* 188 N. Y. 185, 81 N. E. 124 (1907); *State ex rel. Atty. General* v. *Cunningham,* 81 Wis. 440, 51 N. W. 724 (1892); *State ex rel. Lamb* v. *Cunningham,* 83 Wis. 90; 53 N. W. 35 (1892).

Reapportionment statutes have been upheld in certain cases as not in violation of a particular constitutional mandate, and relief has been declined on other grounds, but in seventeen of these cases, jurisdiction

was noted. See *People ex rel Woodyatt* v. *Thompson*, 155 Ill. 451, 40 N. E. 307 (1895); *Heffernan* v. *Carlock*, 198 Ill. 150, 65 N. E. 109 (1902); *Fesler* v. *Brayton*, 145 Ind. 71, 44 N. E. 37 (1896); *Donovan* v. *Holtzman*, 8 Ill. 2d 87, 132 N. E. 2d 501 (1956); *Prouty* v. *Stover*, 11 Kan. 183 (1873); *Opinion of the Justices*, 18 Me. 458 (1842); *Brophy* v. *Suffolk County Apportionment Commissioners*, 225 Mass. 124, 113 N. E. 1040 (1916); *Meighen* v. *Weatherill*, 125 Minn. 336, 147 N. W. 105 (1914); *Smith* v. *Holm*, 220 Minn. 486, 19 N. W. 2d 914 (1945); *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 62 Pac. 237 (1900); *People ex rel. Carter* v. *Rice*, 135 N. Y. 473, 31 N. E. 921 (1892); *Baird* v. *Kings County*, 142 N. Y. 523, 37 N. E. 619 (1894); *Smith* v. *St. Lawrence County*, 148 N. Y. 187, 42 N. E. 592 (1896); *Matter of Reynolds*, 202 N. Y. 430, 96 N. E. 87 (1911); *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564, *appeal dismissed* and *cert. denied*, 322 U. S. 717 (1943); *Bowman* v. *Dammann*, 209 Wis. 21, 243 N. W. 481 (1932); *Sullivan* v. *Schnitger*, 16 Wyo. 479, 95 Pac. 698 (1908).

Wherever limitations imposed by a constitution upon the various departments of a state government are disregarded, the courts must be open to do justice. This proposition is an elementary one and is supported by the vast weight of state authority in this country.

> "It is well settled that courts have jurisdiction and authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts and to declare them invalid for failure to observe non-discretionary limitations imposed by the Constitution. State ex rel. Barrette v. Hitchcock, 241 Mo. 433, Loc. Cit. 473, 146 S. W. 40, Loc. Cit. 53 and cases cited.

> Annotation 2 ALR 1337; 18 Am. Jur. 191-201, Sec. 16-31; 16 C.J.S. Const. Law, 4147, page 438. See also Jones v. Freeman, 193 Okl. 554, 146 P. 2, 564, Locus cited 570, stating that the courts of 38 states have exercised this power. However, these authorities show, the courts may not interfere with the wide discretion which the legislature has in making apportionments for establishing such districts when the legislative discretion has been exercised. *It is only when constitutional limitations placed upon the discretion of the legislature have been wholly ignored and completely disregarded in creating districts that the Courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without a reasonable or constitutional basis.*" [emphasis supplied by court] *Preisler* v. *Doherty*, 284 S. W. 2d 427, 431 (1955).

The nature of the wrong suffered by the aggrieved Tennessee voters in this appeal was singled out recently by the Supreme Court of New Jersey,[22] which on June 6, 1960, decided that:

> "Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." 161 A. 2d at 710.

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[22] *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705 (1960).

The New Jersey Court acknowledged that it had jurisdiction to hear the matter of the unconstitutionality of the 1941 General Assembly Apportionment Act. However, it withheld any determination in order to afford the State Legislature an opportunity to consider the adoption of a reapportionment act when the preliminary 1960 Federal Census data became available, within a reasonable time prior to the 1961 primary election on April 18, 1961.

On January 24, 1961, the State Supreme Court was asked by the Asbury Park Press, Inc. petitioners to reapportion without delay the sixty seats in the General Assembly because the New Jersey legislature continued its past inaction. The Court reserved judgement following oral argument, although Chief Justice Joseph Weintraub warned that the judiciary would compel reapportionment if the legislature did not itself act.[23]

Following the January 24, 1961 argument before the New Jersey high tribunal, the Court informed the Legislature that unless reapportionment action was forthcoming by 5 P. M., on February 2, 1961, a prepared opinion in the *Asbury Park Press, Inc.* v. *Woolley* case *supra* would immediately be filed. As reported by the *New York Times Newspaper,* "the General Assembly met in . . . [a] special session . . . and suspended its rules to adopt the Senate-approved reapportionment bill. Forty-three minutes later, at 3.13 P.M., Gov. Robert B. Meyner signed the measure."[24]

It is manifest from the foregoing cases that the separation of powers concept in government is not invaded by acceptance of, and action pursuant to, this litigation. It is particularly important that the appeal in this case

[23] New York Times, Jan. 24, 1961, p. 31, col. 6.

[24] Id, Feb. 2, 1961, p. 1, col. 2.

be decided on its merits. Here, there is a record replete with the most vicious denials of rights enunciated by both the Tennessee and Federal Constitutions which must not be compromised by any arguments of legislative prerogative or judicial abstention. Here there is no other possible avenue of remedial action absent this Court's effective judgment.

The failure of the Court to effectively restore to the Appellant Tennessee voters their sacred rights in a democratic society would thus completely shock and thoroughly dishearten citizen voters in every American city. If the Court fails to grant relief in a case as outrageous as the case at bar, little doubt exists that the continued, oppressive voting discrimination herein complained of will remain to flourish and to grow worse.

CONCLUSION

It is therefore respectfully urged that the Court accept jurisdiction of this case, and decide it on its merits. We have no doubt whatsoever that such consideration would end the gross discrimination herein complained of.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1961

No. 199 6

CHARLES W. BAKER, Et Al., - - Appellants,

versus

JOE C. CARR, Et Al., - - - - Appellees.

Brief of the City of St. Matthews, Kentucky, By Bernard F. Bowling, Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 108

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees.

BERNARD F. BOWLING
Mayor City of St. Matthews, Kentucky
Amicus Curiae.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes Bernard F. Bowling, Mayor of the City of St. Matthews, Kentucky and respectfully files herewith a brief as Amicus Curiae in the above styled action.

OPINION BELOW.

The opinion of the District Court of the United States for the Middle District of Tennessee is reported in Charles W. Baker, et al v. Joe C. Carr, et al., 175 F. Supp. 649 and in 179 F. Supp. 824.

JURISDICTION.

The City of St. Matthews, Kentucky, is a duly constituted political subdivision of the Commonwealth of Kentucky and Bernard F. Bowling, is the duly elected Mayor of said City and its authorized law officer and he files this brief as Amicus Curiae pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States.

I.

STATEMENT OF APPLICANT'S INTEREST.

The City of St. Matthews, Kentucky, is located in a densely populated area adjacent to the City of Louisville, Kentucky and is located within the 34th Legislative District and within the 36th Senatorial District of the Commonwealth of Kentucky.

This area is inadequately represented in both the House of Representatives and the Senate of the General Assembly of the Commonwealth of Kentucky. The inequality in representation is so glaring and flagrant that it precludes the possibility that there has been any attempt on the part of the Legislature of Kentucky to apportion the Commonwealth into representative districts as nearly equal in population as required by the Constitution of Kentucky.

The applicant has reason to believe that the situation in Kentucky is basically analagous and similar to that of its sister state of Tennessee but believes that the particular problem of under-representation in su-

burban areas adjacent to large cities will not be adequately brought to the attention of this Court.

Surburban areas are in many cases more underrepresented than are the large cities themselves.

This inadequacy while violative of the due process clause, i.e., the 14th amendment, more particularly violates the 9th amendment to the Constitution of the United States which states: "The Enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people" by denying the citizens of certain areas their inalienable rights or so disparaging these rights as to amount to a disenfranchisement of these rights.

It is believed that the impact of the 9th amendment on the questions presented to this Court in this action, is of such importance that the applicant respectfully submits this brief as Amicus Curiae in an effort to bring all facets of the law to the attention of this Court.

ARGUMENT.

The Failure of the General Assembly of Kentucky to Re-Apportion the Legislative and Senatorial Districts of the Commonwealth Pursuant to the Requirements of the Kentucky Constitution Is Violative of the Ninth Amendment of the Constitution of the United States.

A. THE INEQUALITY BETWEEN LEGISLATIVE AND SENATORIAL DISTRICTS WITHIN THE LARGE METROPOLITAN CITY OF LOUISVILLE AND THOSE IN THE SUBURBAN AREA OUTSIDE IT AND ALSO IN JEFFERSON COUNTY IS MORE GLARING THAN THE CONTRAST BETWEEN METROPOLITAN JEFFERSON COUNTY AND RURAL COUNTIES.

In Kentucky the General Assembly, i.e., the Legislature is composed of one hundred House Seats and thirty-eight Senate seats. The Kentucky Constitution requires that the State shall be reapportioned every ten years. (App. p. 23).

Re-apportionment was last carried out in 1942. No re-apportionment was done in 1952 as required by said constitutional provision. Since 1942, there have been tremendous and highly significant shifts of population within Kentucky and since there has been no re-apportionment, the result is, at present, gross inequality in representation.

The population of Kentucky, according to the 1960 census is 3,038,156 and the population of Jefferson County is 610,000.

The areas that have been most affected by population shifts are those immediately outside of large cities such as Louisville, i.e., suburbia and rural Jefferson County. The City of St. Matthews is located in such an area. The citizens in these areas generally

have little voice in the legislative processes as compared with their fellow citizens within the large cities and the citizens of Jefferson County outside of Louisville are no exception.

In Jefferson County, Kentucky, according to the 1960 census, there is a population of 610,947. In Jefferson County there is a total of eleven House seats. Nine of these House seats are within the city limits of Louisville as of 1942 and the remaining two are for the remainder of the County, although part of the area has been annexed by the City of Louisville since 1942. The City of Louisville has a population of 390,639, which is represented by nine House seats. The balance of the people outside of the City of Louisville and the parts that have been annexed since 1942 constitute an estimated 300,000 people. Thus, when you analyze the representation within the city limits, the population of the city is not too greatly under-represented, but the area within the County outside the City is greatly under-represented and is more so than any other area in the Commonwealth of Kentucky.

There are five Senatorial Districts in Jefferson County, four are entirely within the city boundaries while the one remaining District covers the remaining area of the County and the parts that have been annexed since 1942, populated by an estimated 300,000 persons. Thus, the Senator from the 36th District, who represents the suburban and rural areas, represents over three times the number represented by his city brother.

The City of Louisville in the case of both House and Senate Districts is not under-represented, materially. It is the rural and suburbia area that suffers. This is further made evident by comparing the population of the district of the Senator from the 36th District, i.e., 280,000 to that of the rural 26th Senatorial District in Kentucky, which is only 44,000. The people in suburbia and rural Jefferson County have only 1/6th of the voting representation of those in the 26th Senatorial District.

B. THERE IS A FLAGRANT INEQUALITY BETWEEN THE POPULATIONS OF REPRESENTATIVE LEGISLATIVE AND SENATORIAL DISTRICTS AND THAT OF THE RURAL DISTRICTS.

Let us compare the County of Jefferson, in which both the City of Louisville and the City of St. Matthews lie, with rural counties in respect to population and legislative and Senatorial representation.

If each House seat was evenly proportioned, the population in each House district would be 20,262. The 34th and 35th Legislative Districts, which comprises the 36th Senatorial District, all lie in suburbia and rural Jefferson County, outside the city limits of Louisville, representing an estimated 280,000 persons. In contrast, the 19th Legislative District, which is Todd County, has a population of only 11,354 (App. p. 16). The 75th Legislative District, composed of Morgan and Wolfe Counties, has a population of 17,590. The second Legislative District, Ballard and Carlisle Counties, has a population of 13,809 (App. p. 15). The 71st Legislative District, Lewis County, has a population of 13,115. The 25th Legislative District, which is com-

posed of Hardin County, in 1960 had a population of 29,108. It now has a population of 67,769, and only one Legislative seat, while Rockcastle County, the 79th Legislative District, has a population of only 12,334 (App. p. 21).

Following the comparative figures of even proportionment compared with the number represented by the 34th and 36th Districts, these districts are populated by five times as many people as the norm would indicate, or a person in this area would have only 1/5th the voting power of a person in another part of the state, whereas when compared with the other extreme, that of Todd County, there is a ratio of about twelve to one, or about 1/12th of the voting strength.

This situation is not only true when comparing Jefferson County with other counties, but is and will continue to be, true in other suburban areas. It is not enough to allot seats to counties without requiring such representation to be equally spread within the county itself.

The situation in the Senate is not too different from that in the House. The 34th Senatorial District, which is composed of Breathitt, Lee, Magoffin and Morgan counties, has a population of 44,800 people, whereas the 36th District in suburban Jefferson County, represents an estimated 300,000 people, or the people in Jefferson County have 1/6th the voting strength that the people of the 34th Senatorial District have. If each Senate seat were broken up exactly even, which we do not propose as practical or possible, each member would represent 79,951 persons, so the Senator from

the 36th District represents a little over half of this number and the Senator from the 36th District represents three and one-half times the norm.

It is the Appellant's contention that by these tremendous shifts in population caused by an explosive expansion of the suburbs, it is the suburbs that are truly under-represented and that this under-representation, together with gerrymandering, caused such areas to be denied their constitutional rights under the Ninth Amendment to the Constitution of the United States.

The evidence is clear that the rise of the Metropolitan County Districts are flagrantly unequal with those of the rural districts. Can there be any contention that this is not only grossly unfair but unconstitutional.

C. THE FACTS SET OUT ABOVE CLEARLY SHOW THAT THE RIGHTS OF THE CITIZENS OF KENTUCKY HAVE BEEN DENIED AND DISPARAGED IN VIOLATION OF THE NINTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY FAILURE OF THE GENERAL ASSEMBLY TO ACT.

The Ninth Amendment sets forth our basic concept of individual liberties of the individual. While the argument has been made that there is no specific guarantee of the equality of voting strength, we believe this right was guaranteed to the people, although not specifically enumerated.

The government of the United States was conceived solely as a government of delegated powers and nothing more. The government was granted these rights but the people retained all of the individual and personal liberties that were considered a part of the natural law.

These rights have a spirit of expression in the Declaration of Independence; rights that are self-evident in a government of free and equal men; a new government that was to flower and bloom as the rights of the free men flourished.

There are certain basic freedoms which are not contained in any written document and to have and retain these rights, the individual must have the freedom to express his beliefs, and he cannot do this when this right is denied or disparaged by inequality in the means of man's expression, or lack of ability to express.

These human rights cannot any longer be allowed to be destroyed by government, either State or Federal. Therefore, we cannot, by a narrow interpretation of other rights enumerated allow the denial of other basic rights to be denied, because the people only delegate certain rights to the government. This principle is well described in 16 C.J.S., P. 578, P. 199:

> "The Constitutions are not the sources of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect these rights, and have incorporated them into the organic law as a shield against unwarrantable interference by any department of government."

and President John Adams proclaimed:

> "You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."

This Honorable Court has held in Savings and Loan Association v. Topeka, 87 U. S. 655, 22 L. Ed. 455, that we have certain inherent rights which are entitled to protection against the legislative act of the several states even though these rights are unenumerated in the Constitution and are an implied reservation of individual rights. This is the spirit, the doctrine of the Ninth Amendment. We contend that a citizen's right to equal representation and to have his vote count equally with another cannot be denied or abridged by the failure of a legislative body to carry out a duty conferred by a state constitution.

These inequalities cited herein are so glaring that they preclude the possibility that there has been any attempt to grant equal representation in Kentucky. This, on its face, shows the equality of man's rights has been denied and disparaged.

It is our belief that the philosophy of the Ninth Amendment is not to be narrowly construed, but is to be used like the Magna Carta; as a part of a living and growing Constitution.

The natural rights of the citizens of this country are not fixed as of the date we adopted the Constitution. For the Court to hold that this right of reapportionment and equal representation is an unenumerated right and, therefore, does not exist, is to expose the citizens to a type of tyranny the Constitution was adopted to protect us against. One of the basic rights, the right to vote, is, in effect, denied persons who are voting because their vote does not register equally with those of others. These rights are part of our

natural endowment and are fixed in natural law as to be an inherent right. This argument is well summed up by Bennett B. Patterson in his book, "The Forgotten Ninth Amendment" on Page 57:

> "The ever present danger in a democracy is the power of the majority to over-emphasise the importance of our collective rights and permit our individual selves to become captive of our public selves."

The Ninth Amendment in the Constitution is the counterpart of the "General Welfare" clause. It protects the individual in the same manner that the General Welfare clause protects the public. Therefore, these individual rights cannot be protected by merely granting additional seats by reapportioning seats to various cities or counties. It must be done on an equitable basis. It is hoped that the Court will enter an order broad enough to prohibit the sinister type of gerrymandering which, while not directly before this Court, is equally a part of the matter directly before this body and which is equally as repugnant to our Constitution. We must remember that individual liberty is one of the corner stones of this country and if the individual is not free to have these liberties counted evenly and thus have the right to protect his rights, beliefs and wishes, then his rights have truly been disparaged and denied to him.

The matter of personal rights has been well outlined in Mr. Patterson's book on Page 59:

"Not only is government the servant of the people, but it is an untrustworthy and unreliable servant. It cannot be given a free hand in caring for the affairs of its master; on the contrary, it must be limited in many ways; it must be checked at every possible point; it must be at all times under suspicion. Otherwise, it will cease to be servant and take the place of master. Too much emphasis cannot well be laid upon the fear which the "Fathers" had of government. *To them the great lesson of history was, that government always tends to become oppressive, and that it is the greatest foe of individual liberty.*"

The argument has been made that the right to vote is not derived from the Federal government but from the states. It is extremely illogical to argue that we are granted liberties by our Federal government and these same liberties are not protected from the state governments when each of these states has ratified the Constitution.

Thus, these rights that are granted as inherent in the people cannot be taken away by the operation or lack of operation of the states. The argument has, in the past, been held to be invalid; that the Courts will not interfere with a right that is merely political; but these rights, when they are denied by political machinery, are within the purview of the great equity power granted to our courts that for every wrong there is a remedy.

Our Kentucky Court has held in Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865:

"* * * It is for the courts to measure the act of the General Assembly by the Constitution. * * *"

Thus, when their acts have been held to be a violation of our basic rights, so should their failure to act be declared a violation of our basic right. More particularly, when there is a duty to protect these rights in the Constitution (on the part of the General Assembly, they should be ordered corrected forthwith with all deliberate speed.

In the Ragland case, supra, the Court held a Kentucky reapportionment act invalid where the situation was such that the voters in one county exercised more influence than the voters in another district. If it can be held that the court may set aside as invalid an act creating this inequality then the court has the power to declare a failure to act actionable.

> "Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer county shall have seven times as much influence in the government of the State as a man in Ohio, Butler, or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all."

Our system of government provides that the government acquires its rights from the consent of the

governed and if the people governed cannot give their consent freely, then they are denied the means of true equality, to elect those to represent their wishes.

CONCLUSION.

The factual situation in Kentucky has been presented to this Honorable Court because of its analogy to the situation in the Tennessee case presently before this Court. The facts in Kentucky have been set out in detail in order to point out that the situation is not restricted to Tennessee and that the opinion of this Court should be far reaching enough to remedy the situation, not only in Tennessee but in all the states of this great country.

Inequality of voting right is as much a violation of the Constitution as denial of voting rights to our citizenry.

Respectfully submitted,

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LEGISLATIVE DISTRICTS.

Legislative Districts	Counties	Population 1930	1940	1950	1960
1	Fulton	14927	15413	13688	11256
	Hickman	8725	9142	7778	6747
	TOTALS	23652	24555	21466	18003
2	Ballard	9910	9480	8545	8291
	Carlisle	7363	7650	6206	5608
		17273	17130	14751	13899
3	Graves	30778	31763	31364	30021
4	McCracken	46271	48534	49137	57306
5	McCracken	46271	48534	49137	57306
6	Lyon	8530	9067	6853	5924
	Marshall	12889	16602	13387	16736
		21419	25669	20240	22660
7	Calloway	17662	19041	20147	20972
8	Caldwell	13781	14499	13199	13073
	Trigg	12531	12784	9683	8870
		26312	27283	22882	21943
9	Christian	34283	36129	42359	56904
10	Hopkins	37449	37789	38815	38458
11	Crittenden	11931	12115	10818	8648
	Livingston	8608	9127	7184	7029
		20539	21242	18002	15677

Legislative Districts	Counties	Population 1930	1940	1950	1960
12	Union	17053	17411	14893	14537
13	McLean	11072	11446	10021	9353
	Webster	20534	19198	15555	14244
		31606	30644	25576	23597
14	Henderson	26295	27020	30715	33519
(15)	Daviess	43779	53335	57241	70588*
(16)	*15th Dist. comprises City of Owensboro			33651	42471
17	Muhlenberg	37784	37554	32501	27791
18	Hancock	6147	6807	6009	5330
	Ohio	24469	24421	20840	17725
		30616	31228	26849	23055
19	Todd	13520	14234	12890	11364
20	Logan	21875	23345	22335	20696
21	Allen	15180	15496	13787	12269
	Simpson	11336	11752	11678	11548
		26486	27248	25465	23817
22	Warren	33676	36631	42758	45491
23	Butler	12620	14371	11309	9586
	Edmonson	11475	11344	9376	8085
		24095	25715	20685	17671
24	Grayson	17055	17562	17063	15834
25	Hardin	20913	29108	50312	67789

Legislative Districts	Counties	Population 1930	1940	1950	1960
26	Breckinridge	17868	17744	15528	14734
	Meade	8042	8827	9422	18938
		25410	26571	24950	33672
27	Barren	25844	27559	28461	28303
28	Metcalf	9373	10853	9851	8367
	Monroe	13077	14070	13770	11799
		22450	24923	23621	20166
29	Adair	16401	18566	17603	14699
	Green	11401	12321	11261	11249
		27802	30887	28864	25948
30	Marion	15499	16913	17212	16887
	Taylor	12407	13556	14403	16285
		27906	30469	31615	33172
31	Hart	16169	17239	15321	14119
	Larue	21109	25640	25797	10346
		37278	42879	41118	24465
32	Anderson	8494	8936	8984	8618
	Nelson	16551	18004	19521	22168
		25045	26940	28505	30786
33	Bullitt	8868	9511	11349	15726
	Spencer	6606	6757	6157	5680
		15474	16268	17506	21406
34	Jefferson	355350	385392	484615	610947
35	Jefferson	355350	385392	484615	610947

The 36th and 50th districts lie outside the City of Louisville with the exception of a small section in each named. The following districts, all in the County of Jefferson, lie within the boundaries of the City of Louisville:

Legislative Districts	Counties	Population 1930	1940	1950	1960
36	Jefferson	355350	395392	494615	610947
37	Jefferson	355350	395392	494615	610947
38	Jefferson	355350	395392	494615	610947
39	Jefferson	355350	395392	494615	610947
40	Jefferson	355350	395392	494615	610947
41	Jefferson	355350	395392	494615	610947
42	Jefferson	355350	395392	494615	610947
43	Jefferson	355350	395392	494615	610947
44	Jefferson	355350	395392	494615	610947
45	Mercer	14471	14629	14643	14596
	Washington	12623	12965	12777	11168
		27094	27594	27420	25764
46	Boyle	16218	17075	20532	21257
	Garrard	11562	11910	11029	9747
		27778	28985	31561	31004
47	Madison	27621	28541	31179	33482
48	Jessamine	12431	12174	12458	13625
	Woodford	10981	11847	11212	11913
		23412	24021	23670	25538
49	Fayette	69543	78389	100746	131906
50	Fayette	69543	78389	100746	131906
51	Franklin	21064	23308	25983	29421
52	Shelby	17679	17759	17912	18496

Legislative Districts	Counties	Population 1930	1940	1950	1960
53	Oldham	7402	10716	11018	13388
	Trimble	5348	5601	5148	5102
		12750	16317	16166	18490
54	Boone	9595	10820	13015	21940
	Gallatin	4457	4307	3969	3967
		14052	15127	16984	25907
55	Grant	9576	9876	9809	9489
	Owen	10710	10942	9755	8237
		20286	20818	19564	17726
56	Harrison	14859	15124	13736	13704
	Scott	14400	14314	15141	15376
		29259	29438	28877	29080
57	Carroll	8155	9657	8517	7978
	Henry	12564	12220	11394	10987
		20719	20877	19911	18965
58	Kenton	93534	93139	104254	120700
59	Kenton	93534	93139	104254	120700
60	Kenton	93534	93139	104254	120700
61	Kenton	93534	93139	104254	120700
62	Campbell	73391	71918	76196	86803
63	Campbell	73391	71918	76196	86803
64	Bracken	9616	9389	8424	7422
	Pendleton	10876	10382	9610	9968
		20492	19771	18025	17390
65	Mason	18862	19066	18486	19454

Legislative District	Counties	Population 1930	1940	1950	1960
66	Fleming	12061	12827	11969	10690
	Robertson	3344	3619	2881	2443
		16275	16726	14843	13383
67	Bourbon	18060	17982	17752	18178
	Nicholas	8571	8617	7532	6677
		26631	26549	25284	24855
68	Clark	17640	17968	18898	21075
69	Menifee	4956	5691	4798	4276
	Montgomery	11660	12290	13025	13461
		16616	17971	17823	17737
70	Bath	11075	11451	10410	9114
	Rowan	10893	12734	12708	12808
		21968	24185	23118	21922
71	Lewis	14315	15686	13520	13115
72	Greenup	24554	24917	24897	29238
73	Carter	23839	25545	22559	20617
74	Knott	15230	20007	20820	25258
	Magoffin	15719	17490	13839	11156
		30949	37497	34159	36414
75	Morgan	15130	16827	13624	11056
	Wolfe	8425	9997	7615	6534
		23555	26824	21239	17590

Legislative Districts	Counties	Population 1930	1940	1950	1960
76	Breathitt	21143	23946	19964	15490
	Lee	9279	10860	8739	7420
		30422	34806	28703	22910
77	Estill	17079	17978	14677	12466
	Powell	5800	7671	6812	6674
		22879	25649	21489	19140
78	Jackson	10467	16339	13101	10677
	Owsley	7223	8957	7324	5369
		17690	25296	20425	16046
79	Rockcastle	15149	17165	13925	12334
80	Lincoln	17687	19859	18668	16503
81	Casey	16747	19962	17446	14327
	Russell	11930	13615	13717	11076
		28677	33577	31163	25403
82	Clinton	9004	10279	10605	8886
	Cumberland	10204	11923	9309	7835
		19208	22202	19914	16721
83	McCreary	14627	16451	16660	12463
	Wayne	15848	17204	16475	14700
		30475	33655	33135	27163
84	Pulaski	35640	39863	38452	34403
85	Whitley	29730	33186	31940	25815
86	Laurel	21109	25640	25797	24901

Legislative Districts	Counties	Population 1930	1940	1950	1960
87	Knox.....	26266	31089	30409	25258
88	Bell.....	38747	43812	47602	35336
89	Harlan.....	64557	75275	71751	51107
90	Harlan.....	64557	75275	71751	51107
91	Clay.....	18526	23901	23116	20748
	Leslie.....	10765	14961	15537	10941
		29291	38862	38653	31689
92	Letcher.....	35702	40592	39522	30102
93	Perry.....	42186	47828	46566	34961
94	Pike.....	63267	71122	81154	68264
95	Pike.....	63267	71122	81154	68264
96	Floyd.....	41942	52986	53500	41642
97	Floyd.....	41942	52986	53500	41642
98	Johnson.....	22965	25771	23846	19748
	Martin.....	8584	10970	11677	10201
		31549	36741	35523	29949
99	Elliott.....	7571	8713	7085	6330
	Lawrence.....	16713	17275	14418	12134
		24284	25988	21503	18464
100	Boyd.....	43849	45938	49949	52163

"Number of districts; apportionment of representation.—The first general assembly, after the adoption of this Constitution shall divide the state into thirty-eight senatorial districts, and one hundred representative districts, as nearly equal in population as

may be without dividing any county, except where a county may include more than one district, which district shall constitute the senatorial and representative districts for ten years. Not more than two counties shall be joined together to form a representative district: Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the general assembly shall then, and every ten years thereafter, redistrict the state according to this rule, and for the purposes expressed in this section. If, in making said districts inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

SENATORIAL DISTRICTS—KENTUCKY.

Senatorial Districts	Counties	Population 1930	1940	1950	1960
1	Fulton	14927	15413	13688	11256
	Graves	30778	31763	31364	30021
	Hickman	8725	9142	7778	6747
	Marshall	12889	16602	13387	16736
	TOTALS	67319	72920	66197	64760
2	Ballard	9910	9480	8545	8291
	Carlisle	7363	7650	6206	5608
	Livingston	8608	9127	7184	7029
	McCracken	46271	48534	49137	57306
		72152	74791	71072	78234
3	Caldwell	13781	14499	13199	13073
	Calloway	17662	19041	20147	20972
	Crittenden	11931	12115	10818	8648
	Lyon	8530	9067	6853	5924
	Trigg	12531	12784	9683	8870
		64435	67506	60700	57487

Senatorial Districts	Counties	Population 1930	1940	1950	1960
4	Henderson	26295	27020	30715	33519
	Union	17053	17411	14893	14537
	Webster	20534	19198	15555	14244
		63882	63629	61163	62300
5	Logan	21875	23345	22335	20896
	Muhlenberg	37784	37554	32501	27791
	Simpson	11336	11752	11678	11548
	Todd	13520	14234	12890	11364
		84515	86885	79404	71599
6	Christian	34283	26129	42359	56904
	Hopkins	37449	37789	38815	38458
		71732	63918	81174	95362
7	Allen	15180	15496	13787	12269
	Edmonson	11475	11344	9376	8085
	Warren	33676	36631	42758	45491
		60331	63471	65921	66345
8	Daviess	43779	53335	57241	70588
	Hancock	6147	6807	6009	5330
	McLean	11072	11446	10021	9353
		60998	71588	73271	85271
9	Adair	16401	18566	17603	14699
	Barren	25844	27559	28461	28303
	Hart	16169	17239	15321	14119
	Metcalfe	9373	10853	9851	8367
		67787	74217	71236	65488

Senatorial Districts	Counties	Population 1930	1940	1950	1960
10	Breckinridge	17368	17744	15528	14734
	Butler	12620	14371	11309	9586
	Grayson	17055	17562	17063	15834
	Ohio	24469	24421	20840	17725
		71512	74098	64740	57879
11	Campbell	73391	71918	76196	88803
12	Bullitt	8868	9511	11349	15727
	Hardin	20913	29108	50312	67789
	Larue	21109	25640	25797	10346
	Meade	8042	8827	9422	16938
	Spencer	6606	6757	6157	5680
		65538	79843	103037	118480
13	Fayette	68543	78899	100746	131906
14	Green	11401	12321	11261	11249
	Marion	15499	16913	17212	16887
	Nelson	16551	18004	19521	22168
	Taylor	12407	13556	14403	16285
	Washington	12623	12965	12777	11168
		71481	73759	75174	77757
15	McCreary	14627	16451	16660	12463
	Pulaski	35640	39863	38452	34403
	Whitley	29730	33186	31940	25815
		79997	89500	87052	72681
16	Clinton	9004	10279	10605	8886
	Cumberland	10204	11923	9309	7835
	Monroe	13077	14070	13770	11799
	Russell	11930	13615	13717	11076
	Wayne	15858	17204	16475	14700
		60063	67091	63876	54296

Senatorial Districts	Counties	Population 1930	1940	1950	1960
17	Bell	38747	43812	47602	35336
	Knox	26266	31029	30409	25258
		65013	74841	78011	60594
18	Boyle	16218	17075	20532	21257
	Casey	16747	19962	17446	14327
	Garrard	11562	11910	11029	9747
	Lincoln	17687	19859	18668	16503
		62214	59806	68075	61828
19	Clay	18526	23901	23116	20748
	Jackson	10467	16339	13101	10677
	Laurel	21109	25640	25797	24901
	Owsley	7223	8957	7824	5369
	Rockcastle	15149	17165	13925	12334
		72474	92002	83263	74029
20	Anderson	8494	8936	8984	8618
	Franklin	21064	23908	25933	29421
	Scott	14400	14314	15141	15376
	Shelby	17679	17759	17912	18493
		61637	64317	67970	71908
21	Harlan	64557	75275	71751	51107
	Leslie	10765	14981	15537	10941
		75322	90256	87288	62048
22	Jessamine	12431	12174	12458	13625
	Madison	27621	28541	31179	33482
	Mercer	14471	14629	14643	14596
	Woodford	10981	11847	11212	11913
		65504	67191	69492	73616

Senatorial Districts	Counties	Population 1930	1940	1950	1960
23	Letcher	35702	40592	39522	30102
	Perry	42186	47828	46566	34961
		77880	88420	86088	65063
24	Kenton	93534	93139	104254	120700
25	Boyd	43849	45938	46949	52163
	Johnson	22965	25771	23846	19748
	Lawrence	16713	17275	14418	12134
		83527	88983	85213	84045
26	Boone	9565	10820	13015	21940
	Carroll	8155	8657	8517	7978
	Gallatin	4437	4307	3969	3867
	Henry	12564	12220	11394	10987
	Oldham	7402	10716	11018	13388
	Owen	10710	10942	9755	8237
	Trimble	5348	5601	5148	5102
		58181	63263	62816	71499
27	Bath	11075	11451	10410	9114
	Fleming	12931	13327	11962	10890
	Mason	18862	19066	18486	19454
	Menifee	4958	5691	4798	4276
	Rowan	10893	12734	12708	12808
	Wolfe	8425	9997	7615	6534
		67144	72266	65979	63076
28	Bourbon	18060	17932	17752	18178
	Clark	17640	17988	18898	21075
	Estill	17079	17978	14677	12466
	Montgomery	11660	12280	13025	13461
	Powell	5800	7671	6812	6674
		70239	73749	71164	71854

Senatorial Districts	Counties	Population 1930	1940	1950	1960
29	Floyd	41942	52986	53500	41642
	Knott	15230	20603	20320	25256
	Martin	8584	10970	11677	10201
		65756	83959	85497	77101
30	Bracken	9616	9389	8424	7422
	Grant	9876	9876	9909	9489
	Harrison	14859	15124	13736	13704
	Nicholas	8571	8617	7532	6677
	Pendleton	10876	10382	9610	9968
	Robertson	3344	3419	2981	2443
		57182	56807	51992	49703
31	Pike	63267	71122	81854	68264
32	Carter	23839	25545	22559	20817
	Elliott	7571	8713	7085	6330
	Greenup	24554	24917	24887	29238
	Lewis	14315	15686	13520	13115
		70279	74861	68051	69500
33	Jefferson	355350	385392	484615	610947
~~34~~	~~Jefferson~~	~~355350~~	~~385392~~	~~484615~~	~~610947~~
35	Jefferson	355350	385392	484615	610947
36	Jefferson	355350	385392	484615	610947
37	Jefferson	355350	385392	484615	610947
38	Jefferson	355350	385392	484615	610947
36	Jefferson	Lies outside of City of Louisville, with exception of a few areas annexed.			

Senatorial Districts	Counties	Population 1930	1940	1950	1960
		The 33, 35, 37 and 38 Senatorial Districts are all within the area of City of Louisville—Population 390639. **County outside Louisville, with annexed area, which comprises 36th District above, estimated population 300000.**			
34	Breathitt	21143	23946	19964	15490
	Lee	9279	10860	8739	7420
	Magoffin	15719	17490	13839	11156
	Morgan	15130	16827	13624	11056
		61271	69123	56165	45122

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 105 b

CHARLES W. BAKER, *et al.*,

Appellants,

v.

JOE C. CARR, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF AS *AMICI CURIAE*

For John F. English, Eugene H. Nickerson, Shirley M. Raines, Bertram Harnett, Anthony M. Salvati, Walter A. Lynch, Jr., Ray M. Brand, Richard L. Maloney, Norman Levine, Ferdinand I. Haber, Henry A. Rigali, Joseph F. McKnight, Marion Groves, H. P. Mitchell, George L. Erb,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, *et al.*,

Appellants,

v.

JOE C. CARR, *et al.*,

Appellees.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The above named residents of Nassau County, New York, hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in this case. The consent of the appellants was granted, but the consent of the appellees was refused.

These Nassau County residents are all qualified voters in that county and state, and, like the appellants, are discriminated against in voting for representatives in both houses of their state legislatures by reason of the unequal apportionment of voting districts.

The very short brief which these residents seek to submit will argue that the interest in the fair apportionment of state legislative seats in an essential element under the Fourteenth Amendment of equal protection of the laws.

Appellants' argument is directed primarily to the situation in Tennessee. The *amici curiae* believe that it will

be helpful to the Court to have before it the effects of unfair apportionment in the State of New York.

Dated: March 2, 1961.

Respectfully submitted,

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No. 1008 6

In the Supreme Court of the United States

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JOE C. CARR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CHARLES W. BAKER, ET AL., APPELLANTS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of Judge Miller of the District Court for the Middle District of Tennessee on convening a three-judge district court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge district court (R. 214) is reported at 179 F. Supp. 824.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on February 4, 1960 (R. 220–221). Notice of appeal to this Court was filed on March 29, 1960 (R. 310). Probable jurisdiction was noted on November 21, 1960 (R. 314). The jurisdiction of this Court rests on 28 U.S.C. 1253.

(continued from title page)

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Statement of Interest

This brief *amici curiae* is filed on behalf of the above named residents of Nassau County, State of New York, individually. They are all qualified voters in that county and state, and, like the appellants, are discriminated against in voting for representatives in both houses of their state legislature by reason of the unequal apportionment of voting districts.

The persons on whose behalf this brief is filed have a vital interest in the fair and adequate representation of citizens of all parts of a state in its legislature. A holding in the case at bar that the citizens of a state are not entitled to the only remedy available to them, *i.e.*, a judicial remedy, for a gross, deliberate and cynical debasement of their rights to vote for their state legislators, will condemn the *amici curiae* to a virtually permanent inferior status in the choice of representatives of the New York State legislature.

Argument

The apportionment of seats in both the Assembly and the Senate of the New York legislature discriminates heavily against Nassau County. For example, in the Assembly each of the six representatives of Nassau County represents an average of approximately 212,500 persons, whereas the representative from Schuyler County represents a mere 15,000 persons. In other words, the vote of a resident of Schuyler County is worth more than fourteen times as much as a vote of a resident of Nassau County. Nassau County has only six Assembly seats. Yet thirty-one upstate counties, with a combined population almost the same as Nassau, have thirty seats. It thus takes the vote of five Nassau County residents to equal the vote of one of these upstate voters. New York Constitution, Article 3, §5.

In the Senate of the State of New York a similar situation prevails. Each of Nassau County's three senatorial districts has an average population of 433,000 persons, or two and one-half times as many as the least populous upstate district. Because of the provision in the New York Constitution, Article 3, §4, that "No county shall have four or more senators unless it shall have a full ratio [2% of the population] for each senator," Nassau County will not receive a single additional Senator under reapportionment due to the new census. This is so although the population of the county has doubled since 1950 to a figure of about 1,300,000. Yet Suffolk and Monroe Counties, with half or less than half of Nassau County's population, will have exactly the same number of Senate seats, namely, three.

Nassau County citizens are thus starkly and deliberately discriminated against in both houses of the legislature. As a practical matter, a rural upstate legislator is not faced with the problems which are attendant on explosive growth of population such as has taken place in the suburbs. He has not been and will not be sympathetic to these problems, e.g., aid to education, housing, air and water pollution, and the like. This will inevitably mean either that these problems will find no solution or that suburban eyes will turn increasingly to the Federal Government.

There is set forth in the appendix to this brief more details as to the discrimination practiced against Nassau County. For present purposes it is sufficient to state that the discrimination is extreme and indeed deliberate.

The citizens of Nassau County quite plainly have no redress except through the courts. The Constitution of 1894 (the apportionment provisions of which are still in effect) was expressly designed to assure that the large counties would always be under-represented. The New

York State legislature is and has been for many years, as a result of the very discrimination described, controlled by persons elected by a minority of the citizens. Those legislators have a vested interest in unfair apportionment. Yet under the New York State Constitution a new and fair method of apportionment can only be initiated within the next eighteen years by the legislature itself by passing a constitutional amendment for submission to the people. A procedure is provided in Article 19, §2 of the Constitution whereby the people may vote every twenty years on the proposition whether a convention shall be held to revise the Constitution. However, the delegates to that convention are almost all elected from the senatorial districts which are so unfairly districted (less than ten per cent being elected at large).

This brief will not rehearse the arguments so ably presented by appellants, but will direct itself to one main point. It is addressed to those who believe that a free people must find the vindication of their most vital interests not so much through the intervention of courts as through "the vigilance of the people in exercising their political rights." Opinion of Frankfurter, J., in *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946). This view is summarized in the first Flag Salute Case as follows: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, 600 (1940) (per Frankfurter, J.).

Time and again, when this Court has been urged to intervene and to overturn legislation of state or nation, we have been informed by some members of the Court that recourse should in most instances be had to the political influence of the citizenry on its legislative bodies

and not to a judiciary insulated from the people. This has been said in matters involving the most fundamental interests in our society.

A few examples will suffice. In *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538, 556 (1949) the Court upheld a provision of the Arizona Constitution providing that no person should be denied employment for non-membership in a union. Frankfurter, J., concurring, stated:

> "But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself."

Similarly, where the Court upheld an ordinance forbidding the use of a sound truck under certain circumstances, *Kovacs* v. *Cooper*, 336 U. S. 77, 97 (1949), Frankfurter, J., concurring, stated that the matter before the Court was "for the legislative judgment controlled by public opinion."

The same philosophy was articulated by Frankfurter, J., concurring in *Dennis* v. *United States*, 341 U. S. 494, 517, 525, 552 (1951), in which the Court affirmed the conviction, under the Smith Act, of leaders of the Communist Party. The Justice stated:

> "Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. * * * [I]n sustaining the power of Congress in a case like this nothing irrevocable is done. The democratic process at all events is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives."

The philosophy espoused by these opinions is indeed daring. But it presupposes more than an informed and alert electorate. It also contemplates that the democratic process shall not be "impaired or restricted," that the legislative judgment will indeed be "controlled by public opinion," and that the "alertness," and "vigilance" of the people over their representatives will not be frustrated by grossly unfair apportionment.

In short, the view of the above cited opinions has as its premise that the legislative body is representative and not unrepresentative. It would be a mockery indeed to inform us that the vindication of our most vital interests lies with the legislature and then to permit such an apportionment of legislative districts as to make such vindication impossible.

The opinion of Frankfurter, J., in *Colgrove* v. *Green*, 328 U. S. 549 (1946), is by no means inconsistent with the view of the appellants that the Court should intervene in this case. That case involved an apportionment of Congressional districts. The opinion of Frankfurter, J., stated, 328 U. S. at 556, that "The remedy for unfairness in districting is to secure State legislators that will apportion properly, or to invoke the ample powers of Congress." A remedy for unfair Congressional districting may perhaps lie in the election of responsive state legislators. But where is the remedy for unfairness in districting the state legislatures themselves if one man's vote is worth fourteen times that of another's? *Quis custodiet ipsos custodes?*

If we are to take seriously the view that the courts should exercise restraint in interfering with legislative judgments upon interests we prize so highly as those affirmed in the Bill of Rights, the courts must assure that the legislatures are not so districted as to be unresponsive to public opinion.

It is respectfully submitted that the Court should find that the judgment below is inconsistent with the Fourteenth Amendment and should be reversed.

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APPENDIX

How Article 3, §§ 4 and 5, of the New York State Constitution Will Affect Reapportionment of Legislative Seats Under the 1960 Census

Assembly

The State's citizen population of 16,234,200 is divided by the Constitutional 150 members to give a "first ratio" of 108,230. Every county with less than 1½ first ratios of citizen population gets one Assembly seat (except Hamilton, which shares one with Fulton). This uses up 44 seats. Every county with more than 1½ first ratios gets two seats. This uses up 34 more seats, leaving 72, which are allotted among counties with more than two first ratios, as follows.

Two first ratios are subtracted from the citizen population of these counties (representing the two seats already allotted them). The total of the remaining population is divided by the 72 remaining seats, to yield a "second ratio" of 137,425. To each county is given a number of seats equal to the number of full second ratios its remaining population contains. After this is done, five seats are left. These go, in order, to the counties with the highest population remainders.

As the result of this distribution, the 31 smallest counties, with 7.9% of the population, will keep their present 30 seats, or 20.0% of the total seats. They will average 42,700 citizens per seat. New York City, with 45.7% of the population, will have 56 seats, or 37.3%, and will average 132,500 citizens per seat. The six biggest counties outside New York (Nassau, Erie, Westchester, Suffolk,

Monroe and Onondaga), with 29.2% of the population, will have 38 seats or 25.3% of the seats, and will average 125,000 citizens per seat.

Senate

Distribution of Senate seats starts from the biggest counties and works down. The State's citizen population is divided by 50, yielding a "first ratio" of just under 325,000. The six counties with more than three first ratios (6%) of the population (Kings, Queens, New York, Bronx, Nassau, Erie) get one seat for each full first ratio. The Constitution provides that no county shall have four or more Senators unless it shall have a full first ratio for each seat. (This means, for example, that Kings, with 7.77 ratios, gets only seven seats. New York, with 4.81 ratios, gets only four seats. Nassau, with 3.93 ratios, gets only three seats. Thus there is a wastage of population, and the 26 seats that these counties will get in 1964 actually average 366,200 population each, instead of the hypothetical 325,000 first-ratio figure.)

The number of seats newly allotted to each of these counties is compared with the number it had in 1894. Any decrease is disregarded, but any increase is added to 50 to determine the total number of seats. The only increase this time is Queens' and Nassau's eight seats, compared with the one seat Queens had in 1894 (before Nassau split off). So the total number of seats is 57, instead of the present 58.

The 26 seats going to the six biggest counties are subtracted from the total, and the remaining seats are divided into the remaining citizen population (6,712,600). This yields the "second ratio," 216,500, which is nearly 150,000 smaller than the true first ratio of 366,200.

It is on the basis of this smaller second ratio that Senate seats are allotted to the rest of the counties—and furthermore, the larger ones, such as Suffolk, Monroe and Onondaga, get an additional seat for each additional second ratio or major fraction thereof. Thus Monroe, with a citizen population of 573,800 and 2.65 second ratios, gets three seats. (However, Westchester, with a citizen population of 782,400 and 3.61 second ratios, cannot have four seats, because it bumps into the Constitutional restriction against four or more seats without a full first ratio for each seat!) The smaller counties are grouped into senate districts as nearly equal to the second ratio as possible.

Because of the discriminatory features of the formula, the 47 smallest counties, with 15 Senate seats, average only 206,000 citizens per seat. The second-ratio counties combined average 216,000 per seat, while the first-ratio counties average 366,000 per seat. The first-ratio counties, with 58.7% of the citizen population, get only 45.6% of the seats, while the 47 smallest counties, with 19.0% of the population, get 26.3% of the seats.

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to consider claims of denial of equal protection under the Fourteenth Amendment, with respect to the right to vote, resulting from malapportionment of state legislatures.

2. Whether, in the circumstances of this case, the district court should be permitted to exercise its equitable discretion to consider the merits of appellants' claims.

3. Whether rights under the Fourteenth Amendment are violated by gross and unreasonable malapportionment of state legislatures.

STATEMENT

This action was brought on May 18, 1959, in the District Court for the Middle District of Tennessee by certain of the appellants (hereinafter referred to as the "original plaintiffs"), citizens of and qualified voters in the State of Tennessee (R. 3), on their own behalf, on behalf of all qualified voters in their respective counties (R. 6), and on behalf of all Tennessee voters who were similarly situated (R. 6). The action was brought against appellees, the Tennessee Secretary of State, the Attorney General of Tennessee, the Tennessee Co-Ordinator of Elections, and the Members of the Tennessee State Board of Elections in their representative capacities (R. 4–5). The complaint asserted rights under 42 U.S.C. 1983[1] (R. 1–2), which provides for suits in equity or other proper proceedings to redress deprivations of federal

[1] This provision originated as Section 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.

constitutional rights under color of state authority, and claimed that the district court had jurisdiction under 28 U.S.C. 1343(3)[1] (R. 2).

The complaint alleged that the Constitution of Tennessee (Article II, Sections 4, 5, and 6) provides for a maximum of 99 members of the House of Representatives and 33 members of the Senate and directs the General Assembly[2] to allocate, at least every ten years, the Senators and Representatives among the several counties or districts "according to the number of qualified voters in each" (R. 7–8). The complaint further alleged that, despite these mandatory requirements, no reapportionment had been made by the legislature since the Act of 1901[3] (R. 10); that, although many demands had been made upon the legislature to reapportion in accordance with the command of the state constitution (R. 14), and although many bills had been introduced in the legislature to accomplish this purpose (R. 15; R. 32–38; see also Ex. 2 to Intervening Complaint, R.

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[1] That section grants federal district courts jurisdiction over civil actions commenced to redress any deprivations, under color of state authority, of federal constitutional or statutory rights. The plaintiffs also asserted rights under 42 U.S.C. 1988 (R. 1–2), which provides that state law may be applied by federal district courts in cases involving civil rights (including cases arising under 42 U.S.C. 1983) if federal law is inadequate to provide a remedy.

[2] The General Assembly is the official name of the legislature of the state of Tennessee. Tenn. Const., Art. II.

[3] Tenn. Code Ann., Sections 3–101 to 3–109. The complaint was later amended to include the allegation that the Act of 1901 was in violation of the state constitution when drawn because it was passed without the enumeration of voters required by the state constitution (R. 86–87).

126–160), the apportionment of seats in the legislature remained as fixed by the Act of 1901 (R. 9–10). Another allegation was that, during the period intervening between the Act of 1901 and the year 1950, the population of the State of Tennessee grew from 2,021,000 to 3,292,000, but the growth had been very uneven between counties (R. 10). As a result, it was alleged, the counties in which the original plaintiffs resided were entitled to additional representatives (R. 11–12; 21; Ex. B, R. 22), but were denied this right because the distribution of legislative seats was not in accordance with the number of voters in each of the counties and districts (R. 12; Ex. C, R. 24; Ex. D, R. 26). It was alleged that, under the existing apportionment, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R. 28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F., R. 30).

The complaint asserted that, when all the inequalities in Tennessee electoral districts were taken together, the result was to prevent the Tennessee General Assembly, as presently composed, "from being a body representative of the people of the State of Tennessee" (R. 13), and that a minority ruled in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the Tennessee Constitution, and "to the philosophy of government in the United States and all Anglo-Saxon jurisprudence in which the legislature has the power to make law only be-

cause it has the power and duty to represent the people"[3] (R. 13). As a result of the inequality of representation, it was alleged, there had been continuous and systematic discrimination by the legislature against the original plaintiffs and others similarly situated with respect to the allocation of the burdens and benefits of taxation (R. 16–18). The complaint concluded that the original plaintiffs, "and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment," in violation of their right to the equal protection of the laws required by the Tennessee Constitution,[4] and that, "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * *", they were denied the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 12, 19).

The complaint requested that a district court of three judges be convened pursuant to 28 U.S.C. 2281, and that the three-judge court (1) declare unconstitutional, as violative of the equal protection and due process clauses of the Fourteenth Amendment, "the present legislative apportionment of the State of Tennessee"; (2) declare the reapportionment Act of 1901 and the implementing provisions of the Tennessee Code violative of the state constitution and the Fourteenth Amendment; (3) restrain the appellees from

[3] Tenn. Const., Art. I, Section 1, states that "all power is inherent in the people."

[4] Tenn. Const., Art. I, Section 5; Art. II, Sections 4–6; Art. XI, Sections 8, 16.

holding elections for members of the Tennessee legislature under the districts as established by the 1901 Act until such time as the legislature reapportioned the districts in accordance with the Tennessee Constitution; and (4) direct the appellees to hold the next elections for members of the Tennessee legislature on an at-large basis, with the thirty-three candidates for the State Senate receiving the highest number of votes declared elected to the State Senate, and the ninety-nine candidates for the House of Representatives receiving the highest number of votes elected to the House (R. 19–20).

On June 8 and 12, 1959, the appellees filed motions to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties (R. 46–47). On June 17, 1959, appellees filed a motion to dismiss the action without assembling a three-judge court, upon the ground that no substantial federal question was raised (R. 48). This motion was denied on July 31, 1959, by Judge Miller of the district court (R. 94). Judge Miller's opinion stated that he was "not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration" (R. 90), or that the decision in *Colegrove* v. *Green*, 328 U.S. 549, necessarily "close[d] the door to relief in the present case"[1]

[1] In *Colegrove*, the Court sustained the dismissal of an action by qualified voters to restrain the holding of congressional elections in Illinois under the provisions of an Illinois law determining congressional districts. Judge Miller referred to the fact that, in *Colegrove*, the Illinois legislature, in failing to

(R. 90). Judge Miller said further that there were "differences between [*Colegrove*] and the present [case] that may ultimately prove to be significant" (R. 91), and observed that "[t]he situation is such that if there is no judicial remedy there would appear to be no * * * remedy at all" (R. 91). Although in cases involving legislative reapportionment "[i]t can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention," Judge Miller stated that "a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen" (R. 93–94). Accordingly, pursuant to 28 U.S.C. 2284, he sent notice of the pendency of the action to the Chief Judge of the Court of Appeals of the Sixth Circuit (R. 94), and on August 10, 1959, a three-judge court was convened (R. 94–95).

On February 4, 1960, after other appellants, including Mayor Ben West of the City of Nashville, Tennessee,[8] and the City of Chattanooga, Tennessee, had been allowed to intervene as plaintiffs (R. 97, 99), and had filed complaints in intervention (R. 98,

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redistrict, had not violated any specific provision of its own constitution, and that there was ample power in Congress to redistrict the state if existing districts had become inequitable.

[8] West's intervening complaint asserted that the district court had jurisdiction under 28 U.S.C. 1343(4) as well as 28 U.S.C. 1343(3) (R. 103).

169), the three-judge court entered an order dismissing the complaint on the grounds that the court lacked jurisdiction of the subject matter and the complaint failed to state a claim upon which relief could be granted (R. 220). Prior to entering this order, the court rendered an opinion asserting that "the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216). For this reason, the court declared that it had "no right to intervene or to grant the relief prayed for" (R. 220).

SUMMARY OF ARGUMENT

I

Appellants claim that their rights under the Fourteenth Amendment are denied by arbitrary and unreasonable malapportionment of the state legislature, which gravely diminishes the value of their right to vote. The three-judge court below dismissed this action on the ground that the case involves a political question and that therefore it was without jurisdiction, citing *Colegrove* v. *Green*, 328 U.S. 549. This ruling was erroneous.

A. General jurisdiction is conferred by 28 U.S.C. 1343, which gives the district court jurisdiction of any civil action to secure redress for a violation of constitutional rights under color of state authority. *Monroe* v. *Pape*, No. 39, this Term, decided February 27, 1961.

B. Appellants have "standing" to bring this action, for they seek to vindicate personal rights. This

Court has recognized that voters have standing to assert either that they have been denied the right to vote entirely or that they must vote pursuant to an invalid state apportionment of congressional Representatives.

C. The constitutional issue is not a "political question" beyond the power of the federal courts to decide. The Court has held, generally, that issues are not rendered non-justiciable merely because elections are involved when plaintiffs are seeking to vindicate private rights (*Nixon* v. *Herndon*, 273 U.S. 536, 540), and in our view malapportionment problems do not form an exception.

1. The Court has never held that apportionment cases necessarily raise non-justiciable questions. Rather, it has passed on the merits of apportionment systems. *E.g.*, *Smiley* v. *Holm*, 285 U.S. 355. *Colegrove* v. *Green*, *supra*, does not hold to the contrary. Admittedly, three Justices would have held there that apportionment of Representatives is a political question beyond the power of federal courts to decide, but a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that the federal courts do have such power. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that this power should be employed "only in the most compelling" circumstances, which he found were absent.

In no subsequent apportionment case does this Court appear to have held that the federal courts lack power to adjudicate the constitutionality of ap-

portionment systems. In *South* v. *Peters*, 339 U.S. 276, the Court stated that the "[f]ederal courts consistently refuse to exercise their equity powers . . . —not that no power exists. In a series of later cases, the Court has refused to entertain the issue of malapportionment on the merits without indicating whether the reason was lack of power or simply the exercise of equity discretion. It cannot, however, be assumed that the Court intended to settle this important issue, in these *per curiam* decisions, by reliance (not clearly stated) on the position of a minority of the Court in *Colegrove*, without the benefit of full briefing or oral argument.

2. Even if the plurality opinion in *Colegrove* v. *Green* had been accepted by a majority of the Court, the position stated in that opinion has subsequently been undermined by later developments.

a. One of the basic themes of the opinion is that the drawing of district lines for congressional elections is necessarily a political and not a judicial question. But, subsequently, as we have seen, this Court in *South* v. *Peters*, formulated its dismissal of a similar suit in terms of equity discretion. Just this term, in *Gomillion* v. *Lightfoot*, 364 U.S. 339, the Court held that the power of a state to fix boundaries of its political subdivisions cannot be exercised in such a way as to deprive a person of his right to vote because of race. While the *Gomillion* opinion distinguishes the *Colegrove* decision on the ground that legislative inaction, not affirmative action, was involved in the latter case, this distinction can only

relate to the merits of the constitutional violation or to the appropriate remedy. There is no basis for considering a constitutional violation which results from legislative inaction, where the legislature has a constitutional duty to act, as beyond the jurisdiction of the federal courts while a constitutional violation which results from legislative action is within their jurisdiction. And recently, in the Civil Rights Acts of 1957 and 1960, Congress made clear a national policy that, whatever disagreement may exist as to other civil rights, the right to vote should be afforded federal protection to the fullest possible extent, and that that protection should principally take the form of court action.

b. Another important factor on which reliance was placed in the plurality opinion in the *Colegrove* case is the difficulty of finding an effective and appropriate remedy. But recent cases show that state legislatures may well decide to heed their duty under state law when faced with the likelihood of judicial action (*Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705), or with merely a judicial admonition and possible action (*Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.)). Governing bodies do not lightly reject a declaration by a constitutional organ of government that a challenged course of action is unlawful. Thus, no additional judicial remedy may ever be needed. Moreover, the court's declaratory judgment of invalidity could be accompanied by an injunction against the election officials forbidding them to hold an election under the constitutionally offensive apportionment.

If the state legislature continues to refuse to act, other remedies are available to the court. First, it could order an election at large. While the Tennessee Supreme Court has said that Tennessee does not provide for such a remedy (*Kidd* v. *McCanless*, 200 Tenn. 273, 277, 292 S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920), a federal court, in preventing the defeat of a federal constitutional right, is not restricted to the remedies provided by state law. See *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395. Second, the court could order an election conducted on the basis of a new enumeration and apportionment. In the case of Tennessee, an enumeration of qualified voters by the court, or by county election officials on order of the court, would be largely a ministerial act since the federal census provides a count of voting population. The apportionment requires the exercise of only a minimal amount of discretion for the Tennessee constitution provides a mathematical formula. No remapping of districts is required; the court would merely have to decide which adjoining counties would be grouped together. Moreover, if the court below wished to avoid the actual apportionment of representatives, it could require the state election officials to prepare an apportionment on the basis of the new enumeration and submit it to the court for approval.

As in other cases of an alleged constitutional violation, this case should be approached by ascertaining whether the federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then is the time for the question of remedy to be considered. We cannot

accept the assumption that the federal courts possess no appropriate remedy, among their broad and flexible equitable powers, to prevent a violation of the Fourteenth Amendment arising from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking:

3. In any event, the plurality opinion in *Colegrove v. Green*, concerning state malapportionment of Representatives, should not be applied to the significantly different problem of state legislative malapportionment. That opinion stated that Article I, Section 4, of the Constitution gives exclusive authority to Congress to secure fair congressional apportionment. But neither that section nor any other part of the Constitution gives Congress such exclusive power with regard to representation in state legislatures.

In addition, the *Colegrove* opinion stressed the existence of other remedies in Congress or the state legislatures. While Congress has repeatedly failed to act, the state legislatures—spurred by decennial reapportionment by Congress among the states—have generally from time to time reapportioned their congressional districts. But numerous states have done nothing with regard to apportionment of state legislatures for twenty-five or fifty years. The problem has been almost impossible to correct in Tennessee and many other states because of malapportionment in the state legislatures themselves and the absence of any other remedy. The only realistic remedy is federal judicial action.

II

Whether or not a constitutional violation is ultimately found, this case presents "compelling circumstances" (*Colegrove* v. *Green*, 328 U.S. at 565 (Mr. Justice Rutledge concurring)) for the federal courts to exercise their equitable discretion and consider the alleged violation of the Fourteenth Amendment on the merits.

A. The legislatures are even more inequitably apportioned in many states than congressional districts. In Illinois at the time of *Colegrove* the disparity in population between the largest and the smallest congressional districts in any state was eight to one, but as of the 1950 census the greatest disparity in congressional districts was three to one (South Dakota). In contrast, the disparity in state legislative districts is, for example, 676 to 1 in Vermont, 136 to 1 in New Hampshire, 75 to 1 in Florida, and 19 to 1 in Tennessee.

B. Malapportionment of state legislatures is subverting responsible state government by causing public loss of confidence and has resulted in the failure of the states to meet pressing local needs. This has been particularly true with regard to the increasing problems of urban areas, since malapportionment in Tennessee and elsewhere results, in general, in discrimination against urban residents. In fact, the legislatures have frequently not only been indifferent to urban needs, but have affirmatively made it more difficult for the urban areas to meet their own problems by placing, as in Tennessee, discriminatorily

heavy taxation on them, giving them a disproportionately small share of state benefits, and even denying them a fair share of matching federal grants.

C. Federal judicial action is the only realistic remedy for Tennessee's legislative malapportionment.

The only other possible state remedy is by action of the state legislature since the Tennessee Supreme Court has already denied judicial relief and the state constitution does not provide for initiative and referendum by the people. The Tennessee legislature does not offer a realistic remedy, however, since, as the complaint alleges, bills for reapportionment have been repeatedly rejected by the overrepresented rural majority ever since the last apportionment in 1901. The very grossness of the current discrimination militates against its being corrected by legislative means.

While Congress has the power to act under the Fourteenth Amendment, this remedy is also unrealistic. Congress has refused to enact even a bill relating to its own apportionment. Congressional malapportionment is closely related to reapportionment of state legislatures, for a legislature with full urban representation is unlikely to countenance malapportionment of congressional districts discriminating against urban voters.

III

The district court's decision below seems not to determine the question on the merits, *i.e.*, whether the complaint sufficiently alleges a violation of the Fourteenth Amendment. We therefore think that this issue should be left to the court below for initial

determination after this Court holds that that court has jurisdiction and can properly exercise its equitable discretion to consider the merits. For present purposes it is enough to emphasize that at some point malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment.

A. The equal protection clause of the Fourteenth Amendment is violated, not only when a state discriminates with regard to race, but whenever it makes an arbitrary and unreasonable classification. If this is so with regard to legislation affecting economic and social interests, it is particularly so as to the right to vote, which is at the heart of democratic political processes. This Court has recognized that a voter has a constitutional right to have his vote counted without its being diluted by fraud. *E.g., United States* v. *Classic,* 313 U.S. 299; *United States,* v. *Saylor,* 322 U.S. 385. The dilution of one's vote by gross malapportionment is just as unconstitutional. The fact that malapportionment results from state "inaction" is not decisive since the state has a constitutional duty to act in order to prevent the denial of this basic constitutional right—the right of large numbers of voters to participate fairly and equally in their own government. Moreover, a deliberate failure to correct an earlier apportionment—coupled with the state's conduct of elections on the basis of this apportionment—is a form of state action.

B. In addition, gross discrimination violates the due process clause of the Fourteenth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497. Gross malapportionment of state legislatures which seriously re-

stricts the right of voters to participate fairly in choosing the state government clearly violates "the very essence of a scheme of ordered liberty" and a fundamental principle of liberty and justice which lies "at the base of all our civil and political institutions." *Palko* v. *Connecticut*, 302 U.S. 319, 325, 328.

C. Appropriate standards are available to determine whether a particular legislative apportionment is so arbitrary and unreasonable as to violate the Fourteenth Amendment. These include the extent of the disparity between districts within the state; and whether the state affords the people a political remedy, such as initiative and referendum, not requiring the approval of the legislature. If such tests as these are satisfied by those challenging a system of apportionment, the burden of providing a rational explanation should shift to the state.

ARGUMENT

This case involves one of the most basic rights in any democracy, the right to fair representation in one's own government. According to the complaint—and at this stage of the case the allegations of the complaint must be accepted as true—the Tennessee legislature has not been reapportioned since 1901, contrary to the explicit terms of the state constitution which requires reapportionment every ten years. The result is that a single vote in one particular county is worth nineteen votes in another county in electing members of the state legislature; and thirty-seven percent of the voting population elects sixty percent of the State Senate—twenty of thirty-three members—and forty percent of the voters elects sixty-three percent of the House of

Representatives—sixty-three of ninety-nine members. This discrimination has, as in several other states, gravely diminished the value of the franchise of many voters.

This widespread discrimination, principally against urban voters, has at least two consequences. First, these voters are deprived of the right to share fairly in choosing their own government. In numerous cases, this Court has recognised that deprivations of the right to vote, such as those on account of race or color, being unconstitutional, are properly the concern of the federal courts. *E.g., Gomillion v. Lightfoot*, 364 U.S. 339. In Tennessee all urban voters can vote, but their votes count for much less than the votes of their fellow citizens who happen to live in rural areas. The discrimination in this case is just as real as if urban voters had been given only half a vote apiece.

Second, the complaint alleges more than an abstract right to have an equal choice in one's own government—crucial as that right is in a democracy. The complaint states that the extreme underrepresentation of urban voters has resulted in discrimination by the state legislature against urban areas in the state's exercise of its governmental powers. More specifically, the complaint alleges that the state legislature has systematically imposed a discriminatorily larger proportion of state taxes on underrepresented areas but given them back in the form of benefits a smaller proportion of state funds and federal grants given the states on a matching basis. In Tennessee, as in many other states, the underrepresentation of urban voters has been a dominant factor in the refusal of state

legislatures to meet the growing problems of our urban areas.

The three-judge court, however, while admitting that the wrong was serious, held that it had no power to consider the case, and cited *Colegrove* v. *Green*, 328 U.S. 549. As we will show, the plurality opinion in *Colegrove* does not appear to have been adopted by a majority of the Court (pp. 24–29); several of the principles on which it was based are no longer valid (pp. 29–41); and, in any event, that case, which involved congressional districts, should not be applied to state legislative districts (pp. 41–44). In short, we believe the federal courts have jurisdiction to consider whether Tennessee's discrimination against appellants in electing the state legislature violates the federal Constitution.

I

THE THREE-JUDGE COURT HAD JURISDICTION OVER THIS ACTION

A. GENERAL JURISDICTION IS CONFERRED BY FEDERAL STATUTE

Congress has provided in 42 U.S.C. 1983 for suits in equity in federal district courts to redress deprivations of federal constitutional rights under color of state authority. This Court has held that that provision protects the rights guaranteed by the Fourteenth Amendment. *Monroe* v. *Pape*, No. 39, this Term, decided February 20, 1961; *Hague* v. *C.I.O.*, 307 U.S. 496, 526. The case before the Court is a "suit in equity" under 42 U.S.C. 1983 to redress the deprivation by state officials of rights, relating to the elective franchise, which are secured by the

due process and equal protection clauses of the Fourteenth Amendment.[9] Jurisdiction over such an action is conferred on the federal district courts by 28 U.S.C. 1343, which provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "* * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *," and "(4) * * * to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."[10]

B. APPELLANTS HAVE "STANDING" TO BRING THIS ACTION, IN THE SENSE OF HAVING SUFFICIENT PERSONAL INTEREST IN THE RELIEF SOUGHT

The appellants, citizens of and qualified voters in the State of Tennessee (R. 3), instituted this suit in their own behalf and in behalf of other qualified voters who reside in appellants' respective counties or who are similarly situated (R. 6), to vindicate personal and individual rights under the equal protection and due process clauses of the Fourteenth Amendment. The complaint states that appellants have been deprived of their rights under the Fourteenth Amendment to non-discriminatory representa-

[9] Appellants' substantive contentions under the Fourteenth Amendment are discussed below (pp. 58–72).

[10] Subsection (4) was added by the Civil Rights Act of 1957, 71 Stat. 637.

tion in the Tennessee General Assembly (R. 6, 10, 19).

The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters. In *Ex parte Yarbrough*, 110 U.S. 651, this Court held that once the state has defined the class of persons entitled to vote (in that case, for a member of Congress) the right of any member of the class to vote is protected by the Constitution. That right is enforceable in the courts. *Nixon* v. *Herndon*, 273 U.S. 536; cf. *Wiley* v. *Sinkler*, 179 U.S. 58. If the denial of the right to cast a ballot is of a sufficiently "private" character to give the victim standing to sue for relief, a denial of the right to cast an effective ballot cannot logically be treated as a "public" wrong so as to deprive the victim of standing.

The standing of private persons to bring an action in federal courts in circumstances similar to the present case was recognized in *Smiley* v. *Holm*, 285 U.S. 355. There, a unanimous Court reviewed the merits of, and granted relief in, a suit by a Minnesota "citizen, elector and taxpayer" (*id.* at 361) to enjoin the holding of a congressional election pursuant to a state redistricting statute which violated the federal requirement that redistricting be carried out by the state's lawmaking power, including the approval of the governor. Similarly, in *Koenig* v. *Flynn*, 285 U.S. 375, the Court reviewed on the merits a suit brought by "citizens and voters" (*id.* at 379) of New York for a writ of mandamus to the state Secretary of State to certify that

Representatives are to be elected according to districts defined in a resolution of the state legislature. And in *Leser* v. *Garnett*, 258 U.S. 130, this Court took jurisdiction and decided the merits of an action brought by Maryland voters to have the names of women stricken from the list of qualified voters on the ground that the state constitution restricted suffrage to men and that the Nineteenth Amendment to the federal Constitution had not been validly ratified. See also *Hawke* v. *Smith* (*No. 1*), 253 U.S. 221; *Stiglitz* v. *Schardien*, 299 Ky. 799, 40 S.W. 2d 315.

In *Colegrove* v. *Green*, 328 U.S. 549, three members of the Court concluded that the wrong resulting from improper congressional apportionment was suffered by the state "as a polity" rather than by individual voters. *Id.* at 552. But this conclusion was based on the characterization of the action as an attempt to "reconstruct the electoral process" of the state "in order that it [might] be adequately represented in the councils of the Nation." *Ibid.* On the other hand, these Justices suggested that individual voters have standing to redress "a private wrong," namely, their "discriminatory exclusion * * * from rights enjoyed by other citizens." *Ibid.* Here, appellants are in no way seeking to vindicate Tennessee's rights vis-à-vis the Nation. Instead, their sole request is that they themselves receive adequate representation in the councils of the state by prohibiting their "discriminatory exclusion * * * from rights enjoyed by other citizens."

C. THE CONSTITUTIONAL ISSUE IS NOT A "POLITICAL QUESTION" BEYOND THE POWER OF THE FEDERAL COURTS TO DECIDE

Appellants assert a gross violation of important rights protected by the Fourteenth Amendment. The constitutional and legal questions arising out of the protection of such Fourteenth Amendment rights are not "political," in the sense of being non-justiciable, merely because elections are involved. Mr. Justice Holmes, speaking for the Court in *Nixon* v. *Herndon*, *supra*, 273 U.S. at 540, characterized an argument which sought to equate claims pertaining to electoral matters with "political questions" as "little more than a play upon words. Of course, the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years * * *." The proponent of a similar argument in *McPherson* v. *Blacker*, 146 U.S. 1, 23, was reminded by the Court that "the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States * * *." In short, given a sufficient showing of discrimination, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden* v. *Hughes*, 321 U.S. 1, 11. See also *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347. These general principles are applicable to the present case.

1. *This Court Has Never Held That Questions of Apportionment Are Beyond the Power of the Federal Courts.*

It should be stressed that this Court has never held that apportionment cases necessarily raise non-justiciable questions. On the contrary, it has passed on the merits of apportionment systems in several cases and has granted relief in some of them. Thus, in *Smiley* v. *Holm*, 285 U.S. 355, the Court held that the existing Minnesota apportionment of United States Representatives did not meet federal requirements because the governor had refused to approve the bill, and accordingly the Court ordered an election-at-large. The Court also held a state apportionment law invalid (the governor had vetoed it) and ordered an election-at-large in *Carroll* v. *Becker*, 285 U.S. 380. And in *Koenig* v. *Flynn*, 285 U.S. 375, the Court affirmed a decision of a state court holding that, in the absence of a valid districting statute (the governor had not approved the resolution of the state legislature) to conform to the increase in Representatives allotted to a state by Congress, the additional Representatives must be elected at large.

Colegrove v. *Green*, 328 U.S. 549, does not hold to the contrary. Admittedly, Mr. Justice Frankfurter, joined by two other Justices, would have held that state apportionment of Representatives is a political question beyond the power of the federal courts to decide. But a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that federal courts had the power to adjudicate the validity of the system

of apportionment under attack. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that this power should be employed "only in the most compelling circumstances" (*id.* at 565). Since such circumstances were absent, he decided that "the case is one in which the Court may properly, and should, decline to exercise its jurisdiction" [11] (*id.* at 566).

Shortly after the *Colegrove* case, the scope of the Court's decision became even more clear. In *Cook* v. *Fortson*, 329 U.S. 675, 678, involving the Georgia county unit system, Mr. Justice Rutledge described the actual ruling in the earlier case:

> • • • A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion."

In *Cook* v. *Fortson* Mr. Justice Rutledge would have postponed consideration of the issue of jurisdiction to the argument, even though he admitted that the order on appeal might "have become moot in part." *Id.* at 677. The Court, however, dismissed the bills, citing *United States* v. *Anchor Coal Co.*, 279 U.S.

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[11] At this point, Mr. Justice Rutledge quoted in a footnote from *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593: "The power of a court of equity to act is a discretionary one • • •."

[12] For a discussion of the equitable discretion aspect of the *Colegrove* decision, see *infra*, pp. 44–58.

812, which involved the dismissal of a bill seeking an injunction as moot.

In *MacDougall* v. *Green*, 335 U.S. 281, the Court passed on the merits of the claim that an Illinois statute requiring a candidate of a new political party to obtain a specified number of signatures on his nominating petitions in fifty of the 102 counties in the state was unconstitutional. Mr. Justice Rutledge, in a separate opinion, stated that "this case is closely analogous to *Colegrove* v. *Green*" and "[e]very reason existing in *Colegrove* * * * which seemed to me compelling to require this Court to decline to exercise its equity jurisdiction and to decide the constitutional questions is present here. * * * As in *Colegrove* * * * I think the case is one in which * * * this Court may properly, and should, decline to exercise its jurisdiction in equity." *Id.* at 284, 286-287. No member of the Court suggested that the Court was without jurisdiction or power to consider the issue.

In *South* v. *Peters*, 339 U.S. 276, 277, the Court again recognized that the question is not one of judicial power but of its proper exercise. The decision was embodied in a single sentence: "Federal courts consistently *refuse to exercise* their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (emphasis added). None of the cases cited in support of this conclusion held that the issue involved was not justiciable. Reliance was placed on *MacDougall* v. *Green*, in which, as we have seen, the Court passed on the merits of a state

election issue; *Colegrove* v. *Green*, in which a majority of the Court held that the federal courts have power to consider the merits of apportionment cases; and *Wood* v. *Broom*, 287 U.S. 1, 8. In the *Wood* case, the Court held that the Reapportionment Act of 1911, requiring that congressional election districts be of contiguous and compact territory and, as nearly as practicable, of equal population, applied only to districts formed under that Act and not to the Apportionment Act of 1929. Four members of the Court (in a statement beginning on page 8) said that they believed that the bill should be dismissed "for want of equity." That phrase suggests that under traditional equity principles an injunction should not issue, not that the courts are without jurisdiction to consider the merits because a non-justiciable political issue is involved.[12]

In no subsequent apportionment case has this Court held, so far as we can determine, that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *Cox* v. *Peters*, 342 U.S. 936, involving an attack on Georgia's county unit laws, and *Remmey* v. *Smith*,

[12] The Court in *South* v. *Peters* also cited as authority "cf. *Johnson* v. *Stevenson*, 170 F. 2d 108 (C.A. 5th Cir., 1948)." In that case, the court of appeals held that 8 U.S.C. (1946 ed.) 43, which is the same statute as is involved here, did not provide a remedy, as a matter of substance, for fraudulent returns in a Senate primary election: "We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law" (*id.* at 111). And, significantly, the court emphasized that the plaintiff did "not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it" (*ibid.*).

342 U.S. 916, involving a suit to compel reapportionment of the Pennsylvania legislature, the appeals were simply dismissed for want of a substantial federal question, without citation of authority. In *Anderson* v. *Jordan*, 343 U.S. 912, the Court dismissed the appeal on the authority of *Colegrove* v. *Green*, *MacDougall* v. *Green*, and *Wood* v. *Broom* (the opinion of the Court). As we have seen, in the latter two cases the Court considered the issues on the merits. In *Kidd* v. *McCanless*, 352 U.S. 920, involving an attack upon the same Tennessee apportionment law now before the Court, the appeal was dismissed on the authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan*. In *Radford* v. *Gary*, 352 U.S. 991, involving an attack on the Oklahoma apportionment laws, this Court affirmed the district court's dismissal of the action, citing *Colegrove* v. *Green* and *Kidd* v. *McCanless*. And in *Hartsfield* v. *Sloan*, 357 U.S. 916, without citation of authority, the Court denied a motion for leave to file a petition for a writ of mandamus to compel the convening of a three-judge court to pass on the validity of the Georgia county unit laws.

Where the Court has rejected attacks on apportionment systems without citation, it is of course impossible to know the basis of the decision. But such action is just as compatible with a determination that the case clearly does not present "compelling circumstances" necessary for federal judicial relief as with a holding of lack of power. Where the Court has cited *Colegrove* v. *Green*, the reason for this reliance is also not entirely clear. As we

have seen, four of the seven Justices voting in that case upheld the power of the Court to consider the merits. The citation of the *Colegrove* decision to support rejection of attacks on state apportionment must therefore, we believe, mean reliance on the only holding of the prevailing majority in that case, *i.e.*, that an injunction was not justified in the circumstances. It cannot be assumed that the Court intended to settle this important issue of federal judicial power in accordance with the view of the minority of the Court in *Colegrove* v. *Green* by citing *Colegrove* in *per curiam* decisions, without the benefit of full briefing or oral argument.

2. ***Even if the Plurality Opinion in*** Colegrove ***v.*** Green ***Had Been Accepted by a Majority of the Court, Its Position Has Been Undermined by Subsequent Developments.***

As we have seen, a majority of the Court has never explicitly accepted the position of the plurality opinion in *Colegrove* v. *Green,* and we do not believe that it can be treated as an opinion of the Court. But even if that position had been upheld by the Court as a whole, subsequent events have undermined its validity. We believe therefore that, if it is the law of this Court, and is binding on this case (but see *infra,* pp. 41–44), it should be reconsidered and overruled.

In the plurality opinion, it was said that: (1) *Wood* v. *Broom, supra,* 287 U.S. 1, held that there was no federal statutory requirement of equality of population in congressional districts (*id.* at 551); (2) the issues were of a "peculiarly political nature and therefore not meet for judicial determination" (*id.* at 552);

(3) the basis of the suit was "not a private wrong, but a wrong suffered by Illinois as a polity," *i.e.*, that the appellants had no standing to sue" (*ibid.*); (4) the Court could not affirmatively re-map congressional districts (*id.* at 553); (5) an election-at-large would be politically undesirable and might not be acquiesced in by the House of Representatives in the exercise of its power to judge the qualifications of its members (*ibid.*); (6)"[i]t is hostile to a democratic system to involve the judiciary in the politics of the people" (*id.* at 553–554); (7) Article I, Section 4, of the Constitution "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House" (*id.* at 554); (8) and the remedy lay either in invoking the power of Congress or in securing "State legislatures that will apportion properly" (*id.* at 556). The relative importance which the three Justices joining in this opinion attached to each of these factors is not clear.[15] Nevertheless, it seems to us that most of these factors, even if controlling at the time the *Colegrove* case was decided, are of substantially less importance today.

a. One of the basic themes of the opinion is that the drawing of district lines for congressional elections is necessarily a political and not a judicial ques-

[14] We have seen (p. 22) that this statement regarding standing does not apply here.

[15] Accordingly, explanations of the opinion have been various and contradictory. Compare, *e.g.*, Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958); Note, *Injunctive Protection of Political Rights in the Federal Courts*, 62 Harv. L. Rev. 659, 662 (1949); Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L. J. 127 (1946). See also Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 207.

tion. But at least two subsequent decisions of this Court have cast doubt on this proposition. In *South* v. *Peters*, this Court phrased its dismissal of a similar suit in terms of the discretion of equity courts (see *supra*, pp. 26–27). Just this Term, in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346, the Court held that the power of a state to fix the boundaries of its municipalities may not be exercised in such a way as to deprive a citizen of his right to vote because of his race. It is thus clear that a case is not removed from the domain of judicial review merely because the unconstitutional discrimination is accomplished by an exercise of the state's power to control its political subdivisions.

In the *Gomillion* case, the Court distinguished *Colegrove* v. *Green* on the ground that *Colegrove* involved legislative inaction causing dilution in voting strength, in contrast to affirmative legislative action to deprive Negroes of their right to vote. The distinction between legislative action and inaction in *Gomillion* goes, however, not to the power of the federal courts to hear the case, but at most to the merits of the alleged constitutional violation or to the appropriate remedy. If the Illinois legislature in the *Colegrove* case and the Tennessee legislature here had a duty imposed by the federal Constitution to act, their inaction was a constitutional violation (see *infra*, pp. 64–65). That is the issue on the merits. With regard to the remedy, if the malapportionment is due to legislative inaction, a determination of unconstitutionality leaves no earlier statute to fall back on, for the earlier statute would result in even more extreme

malapportionment. As we will show below (pp. 33–40), however, there are effective remedies available other than merely holding the present apportionment unconstitutional. But with respect to the question of the jurisdiction of the federal courts, we submit that there is no basis for considering a constitutional violation resulting from legislative inaction (where the legislature has a constitutional duty to act) as beyond the jurisdiction of the federal courts, while a constitutional violation which results from legislative action is within their jurisdiction.

b. The enactment by Congress, since the *Colegrove* decision, of the Civil Rights Acts of 1957 and 1960, 71 Stat. 637, 74 Stat. 86, also affects the reliance in the plurality opinion on the exclusively political nature of the election process. The 1957 Civil Rights Act included a provision expressly conferring jurisdiction upon the federal district courts of actions "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" 28 U.S.C. 1343(4) (emphasis added). Congress thereby made clear that, in its view, questions involving "political" rights, "including the right to vote," were "meet for judicial determination." Cf. *Colegrove* v. *Green*, *supra*, 328 U.S. at 552. The 1960 Act specifically authorized the federal courts to consider applications for registration for voting under certain circumstances, so as to afford complete judicial protection against discrimination. 74 Stat. 90. Congress thereby emphasized, once again, the national policy of relying on the Judiciary as the organ through which the

right to vote is to be made fully effective."[16] Both Acts express the intent of Congress and the national consensus that, whatever disagreement may exist as to other civil rights, (1) the right to vote should be afforded federal protection to the fullest possible extent, and (2) that protection should principally take the form of court action.

c. Another important factor on which reliance was placed in the *Colegrove* opinion (see *supra*, p. 30) is the difficulty of finding an effective and appropriate remedy for the alleged violation of the Constitution. But the state courts have on several occasions found judicial remedies which have effectively ended at least the most serious instances of malapportionment. See Lewis, *op. cit. supra*, pp. 1066–1068. The most recent such instance is in New Jersey. In *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, the New Jersey Supreme Court held that it had "[t]he authority and the duty" to act in cases of malapportionment. 161 A. 2d at 710. After citing numerous cases in which other courts had accepted this same responsibility," the court held (161 A. 2d at 711):

> From the foregoing it is manifest that the triunity of our government is not invaded by

[16] The 1960 Act defines the word "vote" to include "all action necessary to make a vote effective." 74 Stat. 91.

[17] See *Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii); *Shaw* v. *Adkins*, 202 Ark. 856, 153 S.W. 2d 415; *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757; *Moran* v. *Bowley*, 347 Ill. 145, 179 N.E. 526; *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980; *Denney* v. *State*, 144 Ind. 503, 42 N.E. 929; *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836, rehearing denied, 33 N.E. 119; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315; *Ragland* v. *Anderson*,

> acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence.

Despite its recognition of its power to act, the court did not order any particular relief. Instead, it retained jurisdiction of the cause from the date of decision, June 6, 1960, until the legislature had time to reapportion under the 1960 census figures. The court assumed that the legislators would act pursuant to their oath of office to uphold the state constitution. 161 A. 2d at 712.

When the legislature took no action, the state court stated that it itself would act at 5 p.m. on February 1, 1961. The Governor thereupon convened a special ses-

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125 Ky. 141, 100 S.W. 865; *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N.E. 562; *Donovan* v. *Suffolk County Apportionment Com'rs*, 225 Mass. 55, 133 N.E. 740; *Attorney General* v. *Suffolk County Apportionment Com'rs*, 224 Mass. 598, 113 N.E. 581; *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749; *Board of Sup'rs of County of Houghton* v. *Blacker*, 92 Mich. 638, 52 N.W. 971; *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944; *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40; *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1; *In re Sherill*, 188 N.Y. 185, 81 N.E. 194; *People ex rel. Baird* v. *Board of Sup'rs*, 188 N.Y. 95, 33 N.E. 827; *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 504; *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35; *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; see also *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105; Annotation, 2 A.L.R. 1337.

sion of the legislature and, at 3:13 p.m. on February 1, the legislature passed a reapportionment statute. The New Jersey Supreme Court, at 5 p.m., issued this statement (New York Times, February 2, 1961, p. 1, col. 2, p. 16, col. 5):

> We are informed that the legislature has adopted an apportionment bill which the Governor has signed. Litigation, accordingly, appears to be moot and hence the prepared opinion will not be filed.

Similarly, in *Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.), a suit attacking the apportionment of the Minnesota legislature was referred to a three-judge court. That court stated (163 F. Supp. 184, 187):

> Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes * * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to redistrict."

At the 1959 session, the legislature enacted a new apportionment act and the litigation was dismissed. 177 F. Supp. 803. See also *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii), discussed in Lewis, *op. cit. supra*, pp. 1088–1089.

As *Magraw* shows, a state legislature faced merely with a judicial admonition and possible action may well decide to obey its duty under state law. Thus, no

judicial remedy may ever be necessary in a case such as this one. Indeed, if this Court holds that the federal courts have jurisdiction over alleged violations of the Fourteenth Amendment from gross malapportionment of state legislatures, the latter are not unlikely to act in the future when litigation is started. For there are excellent political reasons for a legislature to reapportion itself rather than wait for the federal courts to act.

Action by the state legislature is even more likely if the federal court, like the New Jersey court in *Asbury Park Press*, after first adjudicating the merits and finding a federal constitutional violation, then reserves action as to the appropriate remedy. A judicial determination that the present mode of apportionment is illegitimate, even without any remedial implementation, is bound to have a profound effect upon a legislature. The concept of legitimacy has a power of its own. Governing bodies do not lightly reject an authoritative declaration by a constitutional organ of government to the effect that a challenged course of action is unlawful.

The court's declaratory judgment of invalidity could be accompanied by an injunction against the election officials forbidding them to hold an election under the constitutionally offensive apportionment. If the state legislature continues to refuse to act, additional remedies are available to the federal courts. We discuss below how these remedies could be applied by the district court in this case if it finds on remand that appellants' rights under the Fourteenth Amendment have been violated.

(1) *An election at large.*—In other situations where no valid apportionment statute existed, elections at large have been ordered. See, *e.g.*, *Smiley* v. *Holm*, 285 U.S. 355; *Carroll* v. *Becker*, 285 U.S. 380; *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105. The Tennessee Supreme Court, however, in *Kidd* v. *McCanless*, 200 Tenn. 273, 277, 292 S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920, has stated that "[t]here is no provision of law for election of our General Assembly by an election at large over the State." But a federal court, in effectuating a federal right, is not restricted to the remedies provided by state law.

It is, of course, established that when, as here, the jurisdiction of the district court rests upon a federal substantive statute, the issues must ordinarily be determined by reference to federal law. See, *e.g.*, *Deitrick* v. *Greaney*, 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 455–456. As Chief Justice Stone declared for the Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176:[11]

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins* * * *. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are

[11] Although *Sola* was a diversity case, the issues were so dominated by the policy of the Sherman Act that the Court applied federal law derived from that policy. 317 U.S. at 176.

> nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. * * *

In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, the Court stressed the necessity of applying federal law where the remedy for the federally created right is in equity:

> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. * * * We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * * [Citations omitted.]

These principles follow *a fortiori* where constitutional rights are involved; state law cannot be permitted to prevent the realization of a constitutional right. Therefore, if no other remedy is considered available, we submit the federal courts have the power to order an election at large, despite a contrary state rule which applies in ordinary circumstances—at least until the state legislature does its duty under the federal Constitution.

(2) *An election conducted on the basis of a new enumeration and apportionment.*—The apportionment provisions of the Tennessee constitution are sufficiently clear and precise so as to permit their application by a court without the necessity of exercising an

undue amount of discretion. Apportionment is based on an enumeration of qualified voters (Tenn. Const., Art. II, Sections 4-6). Preparation of an enumeration by the court, or by county election officials on order of the court, would be largely a ministerial act, since the federal census provides a count of voting population. While the court below suggested that "the Constitution of the state vests the duty of making the enumeration in the legislature" (R. 218), the Tennessee constitution simply provides that "an enumeration * * * shall be made" (Tenn. Const., Art. II, Section 4), without specifying who shall do the enumerating. In any event, as we have already indicated, federal courts may use remedies not provided by state law if they are necessary to effectuate federal rights.

Once the enumeration of qualified voters is completed, it is then necessary to apportion the number of representatives and senators among the various districts, which consist of one or more counties. The state constitution provides a mathematical formula for the process of apportionment. Art. II, Sections 5, 6. Since counties are never divided between districts (Tenn. Const., Art. II, Section 6), the problem of remapping district lines, which was stressed in *Colegrove* (328 U.S. at 553), is not present. The only discretion involved in forming election districts arises where, according to the formula, adjoining counties must be grouped together because they do not have sufficient population.[19]

[19] See the proposed plans of apportionment appellants have attached to their complaint (Exs. A and B; R. 21, 23), in order to distribute fairly the seats in each house of the Tennessee legislature.

Moreover, if the court below wished to avoid the actual apportionment of representatives, it could require that, on the basis of the new enumeration of qualified voters, the state election officials prepare a new apportionment. The plan proposed by the state election officials could then be submitted to the court for its approval.

(3) *A possible reapportionment of votes in the state legislature.*—The New Jersey Supreme Court's decision in *Asbury Park Press, Inc.* v. *Woolley, supra,* 33 N.J. 1, 161 A. 2d 705, 714, suggests another approach that may be mentioned. After an enumeration of qualified voters, existing patterns of over or underrepresentation become apparent. In those cases where overrepresentation exists, a district court could order that the value of the vote of each representative or senator be reduced by the amount necessary to offset the overrepresentation. In other words, in overrepresented counties or districts, representatives and senators would be entitled to fractional, rather than full, votes. Similarly, legislators from underrepresented districts would receive more than one vote each.

The above discussion is not intended to be definitive or complete on the question of an appropriate remedy. Its purpose is only to meet the contention that no appropriate remedy is available and that, therefore, the federal courts are without jurisdiction. On the contrary, we submit that this case should be approached, like other cases of an alleged constitutional violation, by ascertaining whether the

federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then the question of a remedy should be considered. We do not think the premise can be accepted that the federal courts possess no appropriate remedy whatsoever among their broad and flexible equitable powers to prevent a violation of the Fourteenth Amendment from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction.

3. *In Any Event, the Plurality Opinion in* Colegrove *v.* Green *Should Not Be Applied to Malapportionment of State Legislatures.*

As we have emphasized (pp. 23–29), we do not believe that the plurality opinion in *Colegrove* v. *Green* has been accepted by a majority of this Court, so as to deny all power in the federal courts to consider the alleged unconstitutionality of congressional apportionment. We have also argued (pp. 29–41) that, if we are wrong in this respect and if the opinion is deemed to have become a holding of the Court, it is no longer supported by the principles on which it relied. But even if the opinion of the three Justices in *Colegrove* is considered as conclusive on the issue of congressional malapportionment, it nevertheless should not be applied to the significantly different problem of the malapportionment of state legislatures.

a. The plurality opinion relied heavily on Article I, Section 4, of the Constitution. It emphasized that Article I, Section 4, "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House" (328 U.S. at 554). This statement of exclusive power, in itself, was apparently considered by the Court sufficient to support the conclusion that the federal courts had no jurisdiction to act with regard to congressional malapportionment.

Article I, Section 4, has no relevancy to the issue of malapportionment of a state legislature now before the Court. Neither that section, nor any other part of the Constitution, gives exclusive authority to Congress or to state legislatures to decide whether state legislatures are so discriminatorily apportioned as to violate the Fourteenth Amendment. While the state legislatures doubtless have the initial and even primary responsibility to assure fair representation in their own bodies, nevertheless this power cannot be exclusive or final. If the state legislatures violate the federal Constitution through discrimination against urban voters, there must be a federal remedy—just as for other constitutional violations. And while Section 5 of the Fourteenth Amendment gives Congress power to legislate in order to remedy such violations, there is no basis for inferring that this power is exclusive. Cf. *Brown* v. *Board of Education*, 347 U.S. 483. On the contrary, Congress in numerous statutes, including those relied on by the appellants here (see *supra*, pp. 2–3, 19–20), has clearly given jurisdiction to the federal courts to act when the states have violated the Fourteenth Amendment. And this Court has re-

peatedly upheld the power of the federal courts to act pursuant to these statutes. See, *e.g.*, *Monroe* v. *Pape*, No. 39, this Term, decided February 20, 1961.

b. Another factor relied upon in the plurality opinion in *Colegrove* (see *supra*, p. 30), was the existence of other remedies for congressional malapportionment. It was suggested that either Congress or the state legislatures could remedy the situation. While Congress has failed to act on congressional reapportionment (Lewis, *op. cit. supra*, pp. 1093–1095), Illinois did reapportion its congressional districts shortly after the *Colegrove* decision (though the reasons for this action are not clear (see Lewis, *op. cit. supra*, p. 1088)), and many other states have reapportioned their *congressional districts* from time to time (see *infra*, pp. 48–49). But neither Congress nor many state legislatures have provided a remedy against malapportionment in the *state legislatures*, which is generally far more grossly discriminatory than congressional malapportionment. This problem has become almost impossible to correct in Tennessee and numerous other states because of malapportionment of the state legislatures themselves and the absence of any other state remedy. The only realistic remedy is federal judicial action.[20]

c. In addition to the lack of any other effective remedy, there are extremely important practical factors supporting the power of federal courts to take action to protect the important constitutional right to

[20] We discuss below (pp. 50–51, 56–58), in considerably greater detail, the possibility of nonjudicial remedies generally, as well as in Tennessee.

vote. These exigencies will be considered more fully below. It is sufficient here to emphasize that the problem involved in this case—underrepresentation of urban voters—is more serious with regard to elections for the state legislature than to congressional elections (see *infra*, pp. 46–51); itself promotes congressional malapportionment; (*infra*, p. 51); and has seriously undermined responsible state and local government, particularly by causing the state legislatures to ignore pressing urban needs (*infra*, pp. 52–56). We present these arguments, not to show that the federal courts should act because there is a need for judicial action, but rather to show that judicial action, clearly within the power of the federal judiciary, should not be withheld on any asserted grounds based on "practical realities."

II

THIS IS AN APPROPRIATE CASE FOR THE FEDERAL COURTS TO EXERCISE THEIR EQUITABLE DISCRETION AND CONSIDER THE ALLEGED VIOLATION OF THE FOURTEENTH AMENDMENT ON THE MERITS

We have argued above (pp. 24–29) that the decisions of this Court in *Colegrove* v. *Green* and subsequent cases, in refusing to provide a remedy for malapportionment, were based, not on any lack of power of the federal courts over such constitutional violations, but on the ground of equitable discretion. None of these cases has any explicit discussion of the particular reasons for equitable forbearance except for Mr. Justice Rutledge's opinion in the *Colegrove* case itself. He stressed that the shortness of time before the election,

which the plaintiffs sought to restrain, would make it difficult for the Illinois legislature to reapportion its congressional districts; and that the alternative, an election at large, would be contrary to the policy of Congress. He concluded that jurisdiction should be exercised by the federal courts in this sensitive area "only in the most compelling circumstances" (328 U.S. at 565) and that the situation before the Court did not meet this test.

In the instant case, there is no problem of an imminent election, and we submit that the complaint alleges "most compelling circumstances." We believe this to be so, whether or not the complaint is ultimately found to allege a violation of the Fourteenth Amendment—a question involving the substantive merits. As we will discuss below in Point III (pp. 59–60), we do not think that this Court need, at the present time, determine whether a constitutional violation is alleged. Here, in Point II, we emphasize that the allegations are sufficient to show such compelling circumstances in the State of Tennessee that the federal courts should consider the merits of the controversy. Moreover, as we will also stress, the circumstances are not peculiar to Tennessee but exist in many other states even to a greater degree.

At the least, we do not believe that this case presents so clear a situation for judicial refusal to act that this Court should itself determine that there is no reasonable basis for the federal courts to exercise their equitable discretion to hear the case. Since the case falls within the area where the district court could have reasonably exercised its discretion to consider

the merits—if it had not erroneously held that the federal courts are totally without jurisdiction—this issue should be returned to the court below for determination, if this Court has any doubt, whether "compelling circumstances" are presented justifying consideration of the litigation on the merits. For the exercise of equitable discretion, in cases in which that discretion could reasonably be exercised either way, lies initially in the trial court. This is particularly so here where the trial court stated that the evil involved was serious and suggested that, if it had the jurisdictional power, it would consider the merits (see R. 219).

A. STATE LEGISLATIVE DISTRICTS ARE EVEN MORE INEQUITABLY APPORTIONED IN MANY STATES THAN CONGRESSIONAL DISTRICTS

While great disparities in population exist in many states between congressional districts, these inequalities are not nearly as great as the disparities between state legislative districts. At the time *Colegrove* v. *Green* was decided in 1946, the disparity between the most and least populous congressional districts in Illinois was approximately eight to one. Illinois had then, by far, the most badly apportioned congressional districts of any state in the country. Only one other state had a more than four to one disparity (Ohio), another state had a more than three to one disparity (South Dakota), and eleven other states had more than two to one disparities. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. Similarly, in 1950, only one state had a

more than three to one disparity (South Dakota), and nine others had a more than two to one disparity. In Tennessee both in 1946 and 1950, the rate was slightly less than two to one.

In contrast, the situation in most state legislatures is considerably worse.[21] Figures derived from the 1950

[21] Some of the states in which there are large disparities in the lower houses are as follows (based on the 1950 census):

State	Largest and smallest congressional district	Largest and smallest legislative district in their lower house
Alabama	558, 928	79, 846
	350, 726	8, 027
Connecticut	539, 661	
	274, 300	
Lower house, which represents towns		88, 699
		130
Upper house, which represents population		122, 931
		24, 309
Delaware	One Representative	35, 762
		1, 321
Florida	525, 041	165, 028
	210, 428	2, 199
Georgia	618, 431	157, 857
	246, 227	2, 494
New Hampshire	276, 945	2, 179
	256, 297	18
Pennsylvania	444, 921	77, 105
	255, 740	4, 944
Tennessee	482, 393	75, 134
	247, 912	3, 948
Utah	402, 310	15, 437
	286, 452	364
Vermont	One Representative	33, 155
		49

These statistics are derived from tables at 106 Cong. Rec. 13828–13829 (daily ed.) and Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 80.

federal census show that in Kansas, Delaware, Florida, Vermont, and Connecticut, majorities in the lower chamber of the state legislature represented only 22½ percent, 19½ percent, 17 percent, 12½ percent, and 9½ percent of the population, respectively. 106 Cong. Rec. 13828 (daily ed.). In Tennessee, according to the complaint, only 40 percent of the voters elect 63 of the 99 members of the lower house and 37 percent of the voters elect 20 of the 33 members of the upper house (R. 13).

Looking at malapportionment from a slightly different angle, in Florida the smallest population per representative was 2,199, while the largest was 165,028. Thus, the votes of some Florida citizens were worth 75 times the votes of others. In New Hampshire, the smallest population per representative was 16, the largest 2,179, a ratio of 136 to 1. In Vermont, the smallest population per representative was 49, the largest 33,155, a ratio of 676 to 1. In Tennessee, the smallest population per representative is 3,948, the largest 75,134, a ratio of 19 to 1.[22]

As we have seen, the malapportionment of the state legislatures is considerably greater throughout the country (including Tennessee) than malapportionment of congressional districts, serious as the latter also is. This is not a matter of mere accident. For reapportionment of congressional districts is virtually assured by law from time to time in most

[22] The record shows that the 2,340 qualified voters (as contrasted to total population) of Moore County are entitled to one representative in the Tennessee House of Representatives while the 312,345 voters of Shelby County elect only seven (R. 231, 234). This is a disparity of approximately 20 to 1.

states. Every ten years the House is automatically reapportioned. The new apportionment is calculated by the executive department and transmitted to Congress.[23] Each state is then notified of the number of Representatives to which it is entitled. 46 Stat. 26 (1929), as amended, 2 U.S.C. 2(a). If the state loses one or more Representatives, it is required either to reapportion or to elect all its Representatives at large. The latter alternative has rarely been adopted, particularly by states with more than two Representatives. If the state gains one or more Representatives, it can either reapportion or elect the added Representatives at large. Again, the latter alternative has rarely been followed by the larger states.[24]

The result has been that there was no appreciable change in the malapportionment of Congress from 1928 to 1950. In 1928, three states had a disparity between congressional districts of more than three to one and nine others of over two to one. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. In 1946,

[23] The report based on the 1960 census is Message from the President, H. Doc. No. 116, 87th Cong., 1st Sess. (January 12, 1961).

[24] The 1960 census will result in nine states gaining and sixteen states losing one or more Representatives. In addition, five states will have only one Representative and two states elect, at least at present, their only two Representatives at large. See Message of the President, H. Doc. No. 46, 87th Cong., 1st Sess., pp. 1, 2; Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 81.

one state (Illinois) had a disparity of over eight to one, another of over four to one, another over three to one, and eleven others of over two to one. *Ibid.* And in 1950 only one state had a disparity of over three to one, and but nine others had a disparity of over two to one.

The situation is, however, becoming markedly worse in the state legislatures. The reason is that there has been no outside pressure, comparable to that which has led to the reapportionment of Representatives by Congress, to force legislative action. The only major exception is where state courts have assumed jurisdiction (which has been frequent) and provided an effective remedy (which is less so). See Lewis, *op. cit. supra,* pp. 1066–1070. In states such as Tennessee in which the state courts have refused to act (see *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the state legislatures have generally refused to obey the provisions in their own constitutions or statutes requiring regular reapportionment. Although the constitutions of forty-two states require reapportionment of one or both houses of the legislature every ten years (including Tennessee) or more frequently, and three other states required decennial redistricting,[*] in 1958 twenty-three of the then forty-eight states had not reapportioned for periods ranging from ten years to half a century or more. See Lewis, *op. cit. supra,* p. 1060; Alaska Const., Art. VI, Sections 3, 5–7; Hawaii

[*] Reapportionment requires only a reevaluation of the number of legislators allotted each district, while redistricting requires that the districts themselves be redrawn.

Const., Art. III, Section 4. See also 106 Cong. Rec. 13831–13833 (daily ed.) for tabular analyses of the requirements of state constitutions. Alabama, Connecticut, Delaware, Maryland, New Jersey, South Carolina, and Vermont, in addition to Tennessee, had apportionments and legislative districts which were over fifty years old. At least twenty-seven legislative chambers had not been touched for more than twenty-five years. Merry, *Minority Rule: Challenge to Democracy,* Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.). The result has been in Tennessee, as elsewhere, that as population has shifted, particularly toward urban centers, state legislative malapportionment has become drastically worse.

In addition, malapportionment of state legislatures is a basic cause of congressional malapportionment. Since urban voters are underrepresented in the state legislatures, there is little likelihood that the legislatures will reapportion congressional districts to give urban voters their fair proportion of representation in Congress.[26] As a result, urban voters are discriminated against both in the federal House of Representatives and in their own state legislatures, and have no remedy in either body.

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[26] See Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L. J. 127, 130–131 (1946); Strout, *The Next Election Is Already Rigged.* Harper's (November 1959), reprinted at 106 Cong. Rec. 13840 (daily ed.); Statement by William L. Taylor, Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 68.

B. MALAPPORTIONMENT OF STATE LEGISLATURES IS SUBVERTING RESPONSIBLE STATE AND LOCAL GOVERNMENT AND HAS RESULTED IN THE FAILURE OF THE STATES TO MEET PRESSING URBAN NEEDS

In our country's early history, the average citizen looked to the state legislature for initiative and wisdom in the formulation of public policy on domestic issues. U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 38. Only thirty years ago Mr. Justice Brandeis singled out as an important characteristic of our federal system the fact that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (dissenting opinion). The state legislatures, however, have in very large part failed to adapt themselves to modern problems and majority needs, and this failure has resulted in public cynicism, disillusionment, and loss of confidence. Part of the reason the states have failed to respond is that in many states a majority of the people, even a large majority, do not control the legislature. The dictation of legislative action by a minority of the citizens has tended to stifle civic responsibility at the very time when novel problems are pressing upon the country.

More specifically, the most glaring consequence of malapportionment of state legislatures is the gross underrepresentation of urban interests. As cities have grown more rapidly than rural areas, the existing apportionments, when not changed by the legislatures, have tended to create an increasing imbalance in legislative representation discriminating against

urban areas."[27] As early as 1928, H. L. Mencken, in his characteristically caustic manner, commented upon the inequities of this situation. While we certainly do not share Mencken's urban prejudice against rural citizens, he did call attention to the existence of malapportionment: "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans." Mencken, *A Carnival of Buncombe,* 160 (Moos ed., 1956) (reprinted from the Baltimore Evening Sun, July 23, 1928, p. 15, col. 4 (financial ed.). Then, in a rare note of optimism, he added: "But that can't last. It is not only unjust and undemocratic; it is absurd."[28] *Ibid.* Mencken proved a better wit than a prophet, for the same complaint and prognosis were echoed thirty years later by President (then Senator) Kennedy (Kennedy, *The Shame of the States,* New York Times Magazine, May 18, 1958, pp. 12, 37):

> * * * [T]he apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled. * * *

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[27] See Baker, *Rural Versus Urban Political Power* (1955), pp. 16–17, note a, for a table showing the extent of urban underrepresentation in the state legislatures.

[28] It may not be entirely coincidental that the Tennessee House recently voted down a bill to repeal the "Monkey Law," which prohibits teaching about evolution, Washington Post, March 4, 1961, p. A3, col. 7.

The malapportionment of state legislatures not only subverts democratic principles generally, but also has the specific effect of precluding the states from meeting burgeoning needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban.[*] See U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis*, written by the Editors of Fortune (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms, as the complaint here alleges, as systematically discriminatory taxation of underrepresented, generally urban, areas as contrasted with overrepresented rural areas; far greater per capita spending by the state in overrepresented rural areas than in the urban

[*] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.).

areas (R. 16-18; see also R. 229-254);[19] and denial even of the urban areas' proportionate share of matching funds provided by the federal government (R. 119-120). In addition, the state legislatures have frequently refused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the states' neglect of the reapportionment problem is that urban governments now tend to by-pass the states and to enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and defense community facilities. This multiplication of national-local relationships reinforces the debilitation of state governments by weakening the state's control over its own policies and its authority over its own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (the Kestnbaum Commission, whose members were appointed by the President) cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." After hearings on the

[19] Nor is this situation limited to Tennessee. In Colorado, for example, the legislature allows Denver only $2.3 million a year in school aid for 90,000 children, but gives adjacent Jefferson County—a semi-rural area—$2.4 million for 18,000 pupils. Strout, *op. cit. supra*, 106 Cong. Rec. 13840 (daily ed.). In Pennsylvania, the legislature pays $8 per day for the care of indigent patients to each non-sectarian hospital in the state—except Philadelphia's city-owned General Hospital, which must provide such services at an annual cost of $2.5 million. *Ibid.*

Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, House Committee on Government Operations, 85th Cong., 2d Sess., p. 47.

C. FEDERAL JUDICIAL ACTION IS THE ONLY REALISTIC REMEDY FOR TENNESSEE'S LEGISLATIVE MALAPPORTIONMENT

1. *State Remedies*

The only possible state remedies are action by the state legislature, the state courts, or the people themselves. The last two methods can be quickly laid to rest as to Tennessee. The Tennessee Supreme Court, like many other state courts, has specifically denied a state judicial remedy for the plain violation of the state constitution. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. And Tennessee, again like many other states, has no method by which the people themselves can force reapportionment by initiative and referendum (R. 117). A state constitutional convention can be called only by majority vote of two successive legislatures (Tenn. Const., Art. XI, Section 3), and, even if called, its delegates are chosen in the same manner as the legislature.

Redress by the Tennessee legislature, while not impossible, is highly unlikely. First, as the complaint alleges, numerous attempts have been made in the legislature over a period of sixty years to secure reapportionment, all of which have been rejected by the largely rural majority of the legislature, which benefits by the present malapportionment (R. 14–15, 32–38,

111). It is significant that sixty percent of the voters elect only 36 of the 99 members of the House and that no reapportionment bill since 1901 has received more than 36 votes in the House, and that sixty-three percent of the voters elect only 13 of 33 members of the Senate and that no reapportionment bill since 1901 has received more than 13 votes in that body (R. 28-31).

Second, as a matter of logic and political realism, it can hardly be expected that the rural majority would be amenable to reapportionment. As we have seen (p. 49), reapportionment of congressional districts has considerable advantages for the states, when they lose or gain representatives. Therefore, the state legislatures have reapportioned their congressional districts from time to time so that the disparity between districts rarely exceeds two to one. But there are no similar built-in correctives which would prompt a state legislature to redistrict itself. Moreover, in voting to reapportion congressional districts, state legislators do not affect their own positions. In contrast, any vote on state reapportionment involves decisions influencing the fate of almost every legislator, in some cases decisively. Legislators from the overrepresented areas controlling the legislature are particularly threatened since some are certain to lose their seats and which ones cannot be known at the time of reapportionment. As one state court has observed, "It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it." *State* v. *Cunningham,* 81 Wis. 440, 483-484, 51 N.W. 724, 730. Thus, the very grossness

of the discrimination militates against its correction by legislative means.

2. *Federal Remedies*

Congress has the power under Section 5 of the Fourteenth Amendment to pass legislation correcting malapportionment of state legislatures which violate that Amendment. But as a practical matter this remedy is unrealistic. Congress has refused to enact even a bill relating to its own malapportionment. Congressional malapportionment is closely related to reapportionment of the state legislatures, for a legislature with full urban representation is unlikely to countenance malapportionment of congressional districts discriminating against urban voters.

Thus, as Judge Miller stated below (R. 91), "[t]he situation is such that if there is no judicial remedy there would appear to be no practicable remedy at all." Unless the federal courts act, even the grossest types of state discrimination, violating both the Fourteenth Amendment and the very basis of democratic government, will likely go unchecked. In these circumstances, we believe that the federal courts should exercise their equitable discretion to consider the merits of allegations that gross malapportionment of state legislatures violates the Fourteenth Amendment.

III

THE FOURTEENTH AMENDMENT IS VIOLATED WHERE STATE LEGISLATURES ARE ARBITRARILY AND UNREASONABLY APPORTIONED

We have argued above (pp. 23–44) that the federal courts have jurisdiction to consider complaints alleging that gross malapportionment of a state legislature

violates the Fourteenth Amendment. We have further contended (pp. 44–58) that it is appropriate for the federal courts, in cases such as this, to exercise their discretion to consider the allegations on the merits but that, if there is doubt whether the necessary "compelling circumstances" are presented, this question should be considered initially by the district court.

As to the issue on the merits—whether the factual allegations of the complaint present a violation of the Fourteenth Amendment[21]—we do not believe that this issue was determined by the court below.[22] While

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[21] There is of course the additional question, on the merits, whether appellants can prove their allegations. The issue before the Court now, however, is whether the appellants will ever have the opportunity to prove them.

[22] The three-judge court stated (R. 219):

> It is strenuously argued by the plaintiffs that the case alleged in the complaint is one involving a clear violation of their individual rights guaranteed by the Fourteenth Amendment, and for this reason that the Court should in some way overcome its reluctance to intervene in matters of a local political nature and formulate a remedy which would adequately protect their rights. It is insisted that the wrong committed against them by the failure and refusal of the state legislature to abide by the state constitution is clear and unmistakable and that the courts should not leave such wrong without a remedy. With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. * * *

that court said that this case involves a "clear violation" of the rights of appellants (R. 219), it did not in fact decide the federal question on the merits, but rather confined itself to a holding that the court was without jurisdiction to consider the merits.

Since the substantive issue is complex in itself, we do not believe that it should be determined initially by this Court. We think that the case should be remanded to the three-judge court for a full and detailed examination of this question. Hence in this Point we do not discuss the merits with the view of persuading the Court to determine them. Instead, the merits are discussed only to emphasize that malapportionment of state legislatures becomes at some point so gross and discriminatory as to violate the Fourteenth Amendment.

A. THE EQUAL PROTECTION CLAUSE

The appellants allege in their complaint that "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * * [they] and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment * * *" (R. 12; see also R. 10, 19). They assert that the state legislature, despite an explicit command in the state constitution, has failed to reapportion state legislative districts since 1901 (R. 9–10, 86). As a result, they allege, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate * * *" and 40 percent of the voters elects sixty-three of ninety-nine members of the

House (R. 13). They claim that they thereby "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment * * *" (R. 12). The complaint and the supporting papers thus assert a claim of discrimination against Tennessee voters based on their geographic location.

This Court has repeatedly held that discrimination against voters on the basis of race violates the Fourteenth Amendment. See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Gomillion* v. *Lightfoot*, 364 U.S. 339. But, ever since *The Granger Cases* (*Munn* v. *Illinois*), 94 U.S. 113, it has been clear that the Fourteenth Amendment prohibition is by no means exhausted by discrimination based on color. Thus, discrimination between residents of a state on the basis of their geographic location is not insulated from the proscriptions of the Fourteenth Amendment.

Of course, a wide range of discretion is left to the states in choosing units of representation. So long as the state legislature fairly represents the people of the state, there would be no violation of the Constitution. It does not follow, however, that merely because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. State legislation dealing with legislative apportionment must be measured by tests of reasonableness like other state legislation. Such legislation must be "rooted in reason" (*Griffin* v. *Illinois*, 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring)) and must not create classifications so arbitrary and unreasonable as to offend the guarantees of the Fourteenth Amendment.

If a state may not resort to unreasonable and arbitrary classifications in enacting legislation affecting economic and social interests, certainly it cannot do so where the fundamental right to vote is involved. On the contrary, in this area the courts must consider the question stated in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.[11]

---

[11] See also Baker, *Rural versus Urban Political Power* (1955), p. 5:

> One of the basic assumptions of democratic rule is the doctrine of political equality. 'One man, one vote' has been the most concise and effective phrase employed to illustrate the ideal that all citizens should have approximately the same political weight. This means that repre-

Federal rights analogous to those asserted by appellants have long been recognized in the decisions of this Court. In *United States* v. *Classic*, 313 U.S. 299, the Court held that a qualified voter had a constitutional right to have his vote counted in a primary election for the House of Representatives without its being diluted by fraudulent tabulations. Similarly, in *United States* v. *Saylor*, 322 U.S. 385, the Court ruled that a qualified voter had a constitutional right to have his vote counted in the election of a Senator without its being diluted by the stuffing of ballot boxes. In both the *Classic* and *Saylor* cases, the essence of the invalidated conduct was the improper devaluation of the affected votes in relation to the votes of others. The Court found that these frauds violated a general criminal statute parallel to the civil statute involved here. Precisely the same vice can be present in a malapportionment case. The fact that the state conduct is cloaked in the garb of "apportionment" does not shield it from the command of the Fourteenth Amendment, for that Amendment invalidates discrimination "whether accomplished ingeniously or ingenuously." *Smith* v. *Texas*, 311 U.S. 128, 132; see *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Taylor* v. *New Rochelle Board of Education* (S.D. N.Y.) (excerpts reprinted in N.Y. Times,

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sentative assemblies should reflect fairly accurately the character of the body politic. After all, of how much value is equal suffrage if all votes are not weighed equally? A concomitant feature of the right to vote is the right to have the vote counted—and counted as a full vote. Any considerable distortion in the representative picture means a dilution of some votes—in effect, a restriction on suffrage.

January 25, 1961, p. 24). If a state reduced the vote of Negroes, Catholics, or Jews so that each had one-tenth of a vote, or if a state passed an act requiring that all of its legislators be elected by citizens of one county, there could be no question but that the citizens discriminated against would be denied equal protection under the Fourteenth Amendment. Such voter classification plans would be arbitrary on their face. Cf. *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 53. More sophisticated schemes may require more searching judicial inquiry, but that inquiry is within the normal competence of the courts in adjudicating constitutional issues.

With respect to districting and apportionment problems, the Court has indicated that there may be a difference, under the Fourteenth Amendment, between state affirmative action which discriminates and state inaction having the same effect. *Gomillion* v. *Lightfoot*, *supra*, 364 U.S. at 346. There, state action discriminating against Negroes was held to be unconstitutional. If such discrimination was the result merely of the state's failure to correct a prior system of districting or apportionment, it is hard to imagine that state "inaction" of this type discriminating against Negroes could never violate the Fourteenth Amendment, no matter how gross it was. Similarly, as to the issue before the Court here, we submit that the state has a constitutional duty to act with regard to the apportionment of its legis-

lature, if "inaction" deprives large numbers of voters of their basic constitutional right to participate fairly in their own government. Moreover, a deliberate failure to correct an earlier apportionment which has become seriously discriminatory—coupled with the state's conduct of elections on the basis of this apportionment—is a form of state action. We cannot believe that Tennessee can properly claim that, merely because the discrimination has resulted from its inaction, the result cannot violate the Fourteenth Amendment no matter how gross the discrimination is.

B. THE DUE PROCESS CLAUSE

The appellants also alleged in their complaint that the discriminatory apportionment of the Tennessee legislature violates the due process clause of the Fourteenth Amendment (R. 19). The liberty protected by the due process clause, of course, includes the right to vote. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, this Court held that gross discrimination constitutes a denial of due process:

> * * * [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Thus, it appears that malapportionment can so grossly discriminate against urban voters that it violates due process.

In *Palko* v. *Connecticut*, 302 U.S. 319, Mr. Justice Cardozo (for the Court) defined the meaning of the due process clause of the Fourteenth Amendment as it has been construed by a majority of this Court. He stated that the due process clause protects rights "found to be implicit in the concept of ordered liberty" (*id.* at 325); which are "of the very essence of a scheme of ordered liberty" (*ibid.*); which, if abolished, would "violate a 'principle of practice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 105) (302 U.S. at 325); which "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (*Hebert* v. *Louisiana*, 272 U.S. 312, 316) (302 U.S. at 328). We submit that, under any one of these formulas, gross malapportionment comes within the protection of the Fourteenth Amendment's due process clause. Certainly, the right to have a fair share in the choosing of one's own government is "of the very essence of a scheme of ordered liberty" and is a fundamental principle of liberty and justice lying "at the base of all our civil and political institutions." When the state arbitrarily and unreasonably apportions its legislature so as to deny the real meaning of the right to vote, *i.e.*, effective participation in democratic government, due process has been violated.

C. STANDARDS FOR DETERMINING WHETHER APPORTIONMENT IS ARBITRARY AND UNREASONABLE

Without attempting to be definitive, we would suggest several standards for determining whether legislative apportionment is so arbitrary and unreasonable as to violate the Fourteenth Amendment. Again, we do this not to enable the Court to determine the sufficiency of the complaint at this time, but merely to demonstrate that the federal courts are equipped to evaluate the merits of the alleged violations of the Constitution involved here, just as they decide other claims of unconstitutionality.

1. *The extent of the disparity between districts.*— While exact numerical equality of population within legislative districts is, of course, impossible,[34] a number of tests have been suggested for determining whether the disparity between districts is gross. Among yardsticks proposed have been tests based on an evaluation of the relative deviation above or below the average population of all districts in the state, and the relative excess of the largest over the smallest

[34] State courts have recognized that an abstract mathematical criterion should not be applied and that a more general test is required. Thus, in *Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869, the court stated:

> It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of the State which an ordinary knowledge of the population and a sense of common justice would suggest. * * *

See also the tests approved in *State* v. *Cunningham*, 81 Wis. 440, 484, 51 N.W. 724, 730.

districts in the state."* For the disparity in Tennessee, see *supra*, p. 48. The results could well be compared to the disparities which have been recognized in state constitutions as proper throughout our history.

2. *Whether the state affords the people another reasonable remedy.*—Even if the malapportionment is gross, it may well not violate the Fourteenth Amend-

* See Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L.J. 127, 138, note 45 (1946); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L. Rev. 277, 293, note 78 (1956); Celler, *Congressional Apportionment—Past, Present, and Future*, 17 Law & Contemp. Prob. 268, 274–275 (1952).

The following chart lists comparative population figures in certain cases where legislative reapportionment acts have been invalidated by state courts. Of course, the test under any particular state constitution may not be the same as under the Fourteenth Amendment.

	Largest district	Smallest district
Rapland v. *Anderson*, 125 Ky. 141, 100 S.W. 865 (1907)	53, 263	7, 407
Blythe v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931)	128, 595	39, 210
State v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892)	38, 801	6, 823
Baird v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827 (1893)	102, 805	31, 685
Rogers v. *Morgan*, 127 Neb. 456, 256 N.W. 1 (1934)	21, 181	8, 094
Attorney General v. *Suffolk Co. Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916)	6, 182	1, 957
Giddings v. *Blacker*, 93 Mich. 1, 52 N.W. 944 (1892)	91, 420	39, 727
Williams v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906)	116, 033	52, 731

ment if the state, unlike Tennessee (see *supra*, p. 56), affords its people an alternative remedy. For example, the majority cannot complain too seriously about their underrepresentation in the state legislature in a state which provides for referenda initiated by a reasonable number of voters. Under such a system, the majority can reapportion the legislature itself. On the other hand, even such a remedy may not be sufficient if only a small minority of the people are seriously underrepresented. But if the state provides a feasible political remedy, it might be concluded that the state has not been so arbitrary as to violate the Fourteenth Amendment. When the state provides no remedy, however, except in the malapportioned legislature itself, the voters discriminated against are effectively denied, without recourse, fair participation in their own government—a basic right in any democracy. In this situation, the effect of the disparity in representation is greatly increased.

3. *Whether the disparity between districts has any reasonable justification.*—If the disparity is gross and there is no alternative remedy provided by the state, the burden of providing a rational explanation should shift to the state. This was the process suggested by the Court in *Gomillion* v. *Lightfoot*, *supra*, 364 U.S. at 342, where an analogous question of state districting was involved (see *supra*, pp. 31–32, 64–65). If the state has a reasonable justification, even a significant disparity should not be unconstitutional. Thus, a state undoubtedly can provide that one

chamber of its legislature represents equal areas or governmental subdivisions, even though the result does not approximate equal apportionment per voter." In addition, even in the house designed to be apportioned per capita, the state can probably make some reasonable adjustment between popular equality and the balancing of competing interests (such as rural and urban) in the state.

Another possible justification for the disparity might be the amount of time since the last apportionment. A state is not required to keep up with every population shift by constant reapportionment, since obviously a legislature cannot be expected to reapportion every year. However, when the hiatus between reapportionments is excessive, a court can rightly inquire whether the resulting disparity of representation is gross and unreasonable. In determining what is an excessive hiatus, the courts can properly look to the requirements for reapportionment contained in state constitutions throughout the country. The constitutions of forty-two states require apportionment of one or both houses of the legislature every ten years or more frequently, and three other state constitutions require decennial redistricting (see *supra*, pp. 50-51).

In considering whether the disparity in representation is justified, the federal courts can properly consider the state constitution. It would seem difficult

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[*] In Tennessee, however, the state constitution provides that both houses of the legislature are to be apportioned so as to represent voters as equally as possible. Tenn. Const., Art. II, Sections 5, 6.

for a state to justify a disparity which obviously and seriously violates its own constitution. Stated differently, a state should not be heard to present a justification denied by its own supreme law. On the other hand, we of course do not suggest that any violation of a state constitution automatically becomes a violation of the Fourteenth Amendment. But if the disparity in representation is gross, the burden should be imposed on the state to provide some explanation of the disparity in terms of a valid governmental purpose.

D. THE PRINCIPLE OF EQUITABLE ABSTENTION IN FAVOR OF STATE COURTS

When cases of alleged malapportionment of state legislatures are before the federal courts, we believe that the usual procedures followed by the federal courts should be used. In some cases, the principle of equitable abstention may dictate that the district court hold the case until the parties repair to the appropriate state court for resolution of the state issues—for example, in order to avoid the necessity of deciding a federal constitutional issue or to give the state courts an opportunity to decide, authoritatively, undecided issues of state law. See, *e.g.*, *Railroad Commission* v. *Pullman*, 312 U.S. 496; *American Federation of Labor* v. *Watson*, 327 U.S. 582. On the other hand, except for the recent case of *Harrison* v. *N.A.A.C.P.*, 360 U.S 167, the federal courts have generally refused to apply the abstention doctrine in civil rights cases. See, *e.g.*, *Lane* v. *Wilson*, 307 U.S. 268; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903. Nevertheless, the procedure

followed in the *Harrison* case may have considerable attractiveness in cases of state legislative malapportionment in order to avoid federal involvement and interference in the basic framework of state government. See, *e.g.*, *Matthews* v. *Rodgers*, 284 U.S. 521, 525; *Railroad Commission* v. *Pullman*, *supra*, 312 U.S. at 500; *Martin* v. *Creasy*, 360 U.S. 219, 224.

Regardless of the application of these principles in other cases, equitable abstention in favor of the state courts is not appropriate in this case. The questions have already been presented to, and reviewed by, the Supreme Court of Tennessee. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. The Tennessee court refused to declare the 1901 Reapportionment Act violative of the state constitution. The court held that under Tennessee law such a declaration would (1) leave Tennessee without a legislature, either *de jure* or *de facto;* (2) would "destroy the State Government" (200 Tenn. at 282, 292 S.W. 2d at 44); and (3) would render it impossible to enact a new reapportionment law. To require relitigation of the questions of state law presented in this case would lead to an unnecessary proliferation of actions without foreseeable benefit."

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[1] "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together'. In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

CONCLUSION

For the foregoing reasons, we submit that the three-judge court had jurisdiction, and that this is an appropriate case for the federal courts to exercise their equitable discretion and consider the alleged violation of the Fourteenth Amendment. We urge, therefore, that the judgment below be reversed and the case remanded to the three-judge court for consideration of the case on the merits.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

No. 108.

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and
DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF AND ARGUMENT FOR APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 103.

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and
DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF AND ARGUMENT FOR APPELLEES.

OPINION BELOW.

This suit was commenced in the United States District Court, Middle District of Tennessee, and was heard by a three-judge court pursuant to 28 U. S. C. A. 2281. Upon motion by the appellees, the complaint challenging the constitutionality of the State's 1901 legislative apportionment statute was dismissed. The three-judge court unanimously held that under the applicable decisions of this

Court the suit could not be entertained on the theory of a denial of equal protection of the laws under the Fourteenth Amendment. The carefully reasoned opinion of the District Court follows the doctrine of stare decisis and, therefore, the complaint was dismissed since the issues in this case are clearly controlled by applicable decisions previously announced by this Court. The opinion is reported at 179 F. Supp. 824.

JURISDICTION.

The appellees reiterate the insistence made in the "Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss" and deny that this Court has jurisdiction. For the reasons stated there and in this brief, the appellees urge that this appeal be dismissed for lack of jurisdiction.

QUESTIONS PRESENTED.

1. Where a state constitution requires the enumeration of voters every ten years as the basis for creating General Assembly districts; where the last enumeration of the voters was made by the General Assembly under a 1901 enactment; and where the complaint alleged that, due to the passage of time and shifts in population and the failure to reapportion as required by the state constitution, the appellants' votes were debased denying them a republican form of government, is a Federal District Court authorized to entertain a suit to require reapportionment of legislative seats, brought against state officers who are neither charged with the constitutional duty of reapportioning the state nor the statutory duty of calling, supervising, or holding elections for members of the General Assembly?

2. Where a state constitution requires the enumeration of voters every ten years as the basis for creating General

Assembly districts; where the last enumeration of the voters was made by the General Assembly under a 1901 enactment; and where the complaint alleged that, due to the passage of time and shifts in population and the failure to reapportion as required by the state constitution, the appellants' votes were debased denying them a republican form of government, (1) does a Federal District Court have jurisdiction of the subject matter, and (2) if so, is the failure of the General Assembly to reapportion (a) such "state action" as comes within the prohibition of the equal protection clause of the Fourteenth Amendment, or (b) a violation of the civil rights statutes?

3. If questions 1 and 2 are answered in the affirmative, can the equity powers of the Federal courts be invoked to require reapportionment of General Assembly districts by judicial fiat?

4. Where the highest court of a state has construed a provision requiring legislative apportionment every ten years as being purely a legislative function and not self-executing nor enforceable by the state courts, and where the state court declared that the legislature, if found to be a de facto body, would be legally impotent so as to destroy the trichotomy of state government, will this Court hold (a) that the state court decision is not binding on this Court when this Court refused to entertain an appeal involving the same issues in 1956 (Kidd v. McCanless, 352 U. S. 920), and (b) that the failure of the General Assembly to follow the state constitution under such circumstances is a denial of equal protection of the laws under the Fourteenth Amendment?

5. If the equity powers of the Federal courts cannot be exercised to redistrict because of inequality of **representation in Congress**, will such equity powers be exercised to require reapportionment to correct inequality of **representation in a state legislature**?

STATEMENT.

The appellants, as individuals and as voters of the State of Tennessee, sued six officials of the State alleging a denial of the equal protection of the law because of the failure of the General Assembly to reapportion legislative districts on the basis of the number of qualified voters as provided by the state constitution.

After filing the action, the Mayor of the City of Nashville, Tennessee, was permitted to intervene as a plaintiff in the District Court on behalf of himself and all of the residents of said city (R. 99). The City of Chattanooga and the City of Knoxville were also allowed to intervene as plaintiffs (R. 221-222).

Posited against the allegations in the complaint, the appellees have filed a motion to dismiss. Before the Court reaches the basic complaint of the appellants, it must decide whether the appellants have a right to maintain this suit and whether the appellees have such duties in connection with the premises as will permit this suit to be maintained against them. Obviously, the appellants have no interest in the subject matter which is different from any other voter in Tennessee. Moreover, the appellees are not sued as individuals but as officers of the State who have no constitutional nor statutory duties concerning reapportionment and neither do they supervise or conduct elections.

The appellants averred that the Constitution of Tennessee, Article II, Sections 4, 5, and 6, directs the Legislature at the expiration of each ten-year period to make an enumeration of the qualified voters and to apportion the members of the Legislature among the several counties or districts according to the number of qualified voters therein, but that no reapportionment has been made by the Legislature since 1901 and that the distribution of legislative seats remains substantially as provided in the Act of 1901.

The appellants further averred that due to the passage of time and shifts or changes in population since 1901, the present legislative distribution is disproportionate to the distribution of population in the state. It should be noted that the Constitution of Tennessee requires apportionment to be based on the number of qualified voters rather than on the basis of population.

As a consequence of the failure of the Legislature to enact new apportionment legislation, the appellants averred that the General Assembly of the State of Tennessee is no longer a representative body, that a minority now rules in Tennessee, and that the State of Tennessee no longer enjoys the republican form of government guaranteed by the Constitution of Tennessee and the Constitution of the United States (R. 12-13).

The appellants averred that inequality of legislative representation constitutes a dilution of their voting rights and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. The appellants further averred that inequality of representation has resulted in legislative discrimination against them with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power.

The District Court was asked: (1) to declare the apportionment Act of 1901 unconstitutional and to enjoin its enforcement, (2) to order an election at large without regard to counties or districts, and (3) in the alternative to direct the appellees to hold an election in accordance with the formula of legislative representation provided in the Constitution of Tennessee, using the 1950 or a subsequent federal census to determine the number of qualified voters (R. 19-20).

The appellees filed a motion to dismiss on the grounds that the District Court did not have jurisdiction of the

subject matter of the suit, that the appellants had not stated a claim upon which relief could be granted, and that indispensable parties had not been joined (R. 46-47).

The three-judge Court unanimously sustained the motion and denied relief.

The District Court held that this Court, in **Kidd v. McCanless**, 352 U. S. 920, had considered the identical Tennessee apportionment statutes and the identical state of facts and had not only rejected the appellants' contentions but had supported its decision in **Radford v. Gary**, 352 U. S. 991, denying relief, by citing **Kidd v. McCanless** together with **Colegrove v. Green**, 328 U. S. 549 (R. 216-217).

The District Court further held that the remedies suggested were neither feasible nor legally possible. To declare the present Tennessee apportionment statutes unconstitutional would result in the destruction of the state government, as held by the Supreme Court of Tennessee in **Kidd v. McCanless**. The Court further held that to order an election at large would be neither practical nor legal. The Court could not supervise an election and such election, if held, would result in geographical inequalities and discriminations. If a legislature were elected, the Court could not compel it to enact new apportionment legislation.

The District Court then held that Tennessee apportionment legislation must be based on an enumeration of the qualified voters, that such enumeration is a legislative function, and that for the Court to exercise the function would constitute judicial legislation and an unwarranted intrusion into the political affairs of the State of Tennessee.

The Court, therefore, sustained the motion to dismiss (R. 214-220).

SUMMARY OF ARGUMENT.

This case involves issues which are at the very heart of the increasingly difficult and delicate field of state and federal relationships. The most sensitive issue is whether or not this Court will disregard its prior decisions and those firmly imbedded historical concepts concerning the apportionment of state legislatures and inject the federal judiciary into the arena of state political conflict, or use it as an instrument of local political coercion.

The reasons are numerous and cogent why the Court, without hesitation, should affirm the judgment of the District Court.

The failure of the appellants to sue officials having duties relating to legislative apportionment or to holding and conducting elections is fatal. Since indispensable parties have not been sued the Court cannot grant relief because those having such duties would not be bound by a decree in this case.

The rule is elementary that there must be parties before the Court with opposing legal interests. In their absence, the suit must fail for want of justiciability. Here, the appellants, as voters, have interests which are the same as all other Tennessee voters. Special injury is not alleged. Similarly, the appellees have no constitutional or statutory duties concerning apportionment or elections for members of the General Assembly. Thus, a decree of the Court would bind no one and would be advisory only.

In substance, the suit is against the State, contrary to the Eleventh Amendment. The obvious purpose of the suit is to control the sovereign—i. e., the exercise of state legislative power. This result is sought by coercing state action by suing the appellees who are state administrative and judicial officers.

The appellants claim a dilution of their voting rights resulting in unequal or disproportionate representation in the General Assembly. They erroneously argue that they are the subjects of purposeful and systematic discrimination. However, they do not claim that they have been denied the right to vote in free elections, or that their votes have not been counted when cast for members of the General Assembly. It follows that the nexus of the complaint is the denial of a republican form of government. The Constitution expressly declares that this problem addresses itself to Congress instead of the federal judiciary.

The argument that the state government is not republican in form because representation is not based upon "population" is as old as the republic itself. As every student knows, the population concept was compromised and found inadequate by the framers of the Constitution who adopted a different formula for selecting United States Senators. Whether or not the appellants' votes have less weight in electing legislators than their "country cousins", or whether or not the appellants have been denied a republican form of government, depends upon subjective definitions because Congress, if it could, has not set standards or prescribed criteria to formulate the basis of judicial judgment.

Although the right to vote for members of Congress is derived from Article I, Section 2, of the Constitution of the United States, the doctrine of judicial self-limitation was applied in **Colegrove v. Green**, 328 U. S. 549. There the Court declared that the issues were peculiarly political and the federal judiciary should not be injected into the politics of the people by apportioning Congressional districts. The case at bar deals with the right to vote for members of the state legislature. This is a state right. On the other hand, **Colegrove v. Green** dealt with the right to vote for members of Congress, which is a federal right.

Although a much stronger case was before the Court in that case, the Court correctly refused to enter the ". . . political thicket".

The recent decisions of this Court control the case at bar. **South v. Peters**, 339 U. S. 276; **Cox v. Peters**, 342 U. S. 936; **Remmey v. Smith**, 342 U. S. 916; **Anderson v. Jordan**, 343 U. S. 912; **Kidd v. McCanless**, 352 U. S. 920; **Radford v. Gary**, 352 U. S. 991. These cases are to the point that the Federal Courts will not exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. These cases are indistinguishable from this case and they are an absolute bar to the appellants' claim.

Further, this is not a new problem to the judiciary in Tennessee. **Kidd v. McCanless**, 200 Tenn. 273, certiorari denied, 352 U. S. 920. The state supreme court held that if the present apportionment laws have become unconstitutional with the passage of time, the prior apportionment laws are invalid for the same reason. In the absence of a valid apportionment statute, no means would be provided for holding elections for members of the General Assembly. After declaring that the de facto doctrine cannot be applied to an apportionment statute, the state supreme court concluded:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

The destruction of a coordinate branch of state government would be fatal to the American tripartite constitutional system. In view of the holding in the Kidd case, the state supreme court, in substance, has construed these pro-

visions of the state constitution as not being self-executing or mandatory upon the Legislature. In effect, the appellants now beseech this Court to over-turn the Tennessee decision and declare those provisions in the state constitution to be either self-executing or mandatory.

The appellants have summarized the prayers of the complaint in the District Court. They sought four types of relief (Brief for Appellants, pp. 15-16).

First, they sought an injunction against the appellees to restrain the enforcement of the 1901 apportionment statute. Second, the appellants prayed that the 1901 apportionment law be declared unconstitutional and its enforcement enjoined. Third, the appellants implored the Court to order the next election of members of the General Assembly from the state at large. Fourth, as an alternative to an election at large, the appellants proposed that the Court order the appellees to hold an election under the constitutional formula using the 1950 or 1960 official Federal Census figures to apportion the state's qualified voters.

In their brief the appellants appear to have renounced the foregoing and they now have in mind ". . . practical considerations" and their new approach ". . . does not involve an assumption by the District Court of legislative duties or responsibilities". Apparently the appellants now realize that the relief which was prayed in the complaint involves an assumption by the District Court of legislative duties and responsibilities. Perhaps the appellants would also admit that the obstacles pointed out by the District Court and the Supreme Court of Tennessee are real whether they be denominated as "practical" or "legal" in nature. In any event, the appellants now say it is preferable to take "corrective action" by steps. The import of the proposal is that the case be remanded (a) to vacate the existing order entered by the District

Court; (b) to retain jurisdiction in the lower court, but await the action of the 1963 General Assembly; and (c) if (b) fails, to grant equitable relief by injunction. In the final analysis the appellants suggest relief which ultimately is equitable in nature and which partakes of legislative duties or responsibilities now looked upon by them with disfavor.

Applicable to the foregoing proposed avenues of relief a number of generalizations appear appropriate. The proposed remedies are not feasible or legally possible. Under the prior decisions of this Court such remedies are foreclosed.

The proposal of the appellants that the case be remanded to the District Court without directions is tantamount to requesting the Court to compose the federal judiciary into a supervening federal authority to control the political activities of a sovereign state. The Court should reject a political stratagem which is clearly not a judicial remedy.

If a remedy is needed it lies with the people of the state. They are the reservoir of all sovereign power. A different apportionment statute will be enacted if and when demanded of the Legislature by the body politic.

In addition to the propositions heretofore discussed, a brief statement concerning the step by step determinations which may be involved seems to be pertinent.

At the outset the Court must determine whether the failure to sue indispensable parties is fatal and whether the necessary parties are before the Court so that a decree will have efficacy. If the Court sustains this insistence of the appellees, the District Court should be affirmed without reaching the other issues.

Next, if the issues are found to be justiciable, the Court should resolve the question of whether or not this is a

suit against a sovereign state prohibited by the Eleventh Amendment.

In the unlikely event that the Court rejects the foregoing contentions, an adjudication, whether on the theory of a suit in equity or a declaratory judgment, will require the same basic determinations concerning the subject-matter. This is true because a suit will not lie for a declaratory judgment unless the Court would also have the power to grant equitable relief.

If the rights of the parties are declared, the issues should be decided in favor of the appellees and the judgment of the District Court should be affirmed.

Should it be concluded that the judgment of the District Court should be reversed, this Court must initially consider and resolve some basic principles of state law. This Court, contrary to the implicit holding of the Tennessee Supreme Court in **Kidd v. McCanless**, must hold that the apportionment provisions of the Tennessee Constitution are either self-executing or mandatory. As a matter of fact, both were rejected in **Kidd v. McCanless**, because the opinion is based on the de facto doctrine. If the state court had been of the opinion that the provisions are either self-executing or mandatory, the propositions would be decisive in **Kidd v. McCanless.** The force and effect of the construction of the apportionment provisions of the state constitution should be controlling as propositions of state law on this appeal. **Erie Railroad Co. v. Tompkins**, 304 U. S. 64. If this Court finds that it should not adjudge state law by construing the Tennessee Constitution, or if the Court is of the opinion that it is bound by the implicit doctrine of **Kidd v. McCanless**, the judgment of the District Court should be affirmed.

The next proposition of state law for the Court to resolve is whether or not the 1901 apportionment statute,

as a matter of state law, violates the state constitution. In **Kidd v. McCanless** the state supreme court refused to strike down the statute on the ground of unconstitutionality. Accordingly, this Court should follow the state court and hold that as a matter of state law the 1901 enactment is not unconstitutional and, further, that this Court is bound on state law by the state decision. If this Court finds that the state's highest court has refused to hold that the 1901 state statute violates the state constitution, the decree of the District Court should be affirmed.

If the propositions of state law are decided favorable to the appellants, the Court must then decide the questions of federal law involved. Before the appellants are entitled to relief, this Court must conclude that since the 1901 apportionment statute offends the state constitution, the appellants have been deprived of equal protection of the law, or a federally protected civil right as defined by Congress. Otherwise, the judgment of the District Court must be affirmed.

ARGUMENT.

I.

SINCE THERE ARE NO ADVERSE LEGAL INTERESTS, THERE IS NO JUSTICIABLE ISSUE.

The alleged controversy does not touch the legal relations of parties having adverse legal interests and, therefore, a decree, if entered, would constitute an advisory opinion. This is true because the appellants are without authority to maintain the action, and the appellees, as individual defendants, do not have such adverse legal interests to pose a real and substantial controversy.

A. The Appellants Are Without Authority to Maintain the Action.

The individual appellants describe themselves in the complaint as "qualified voters" and insist that their voting rights are being diluted and that their votes are debased (R. 3). They bring the action on their own behalf **and on behalf of all other voters in the State of Tennessee** (R. 4). This allegation implicitly admits that the interest of the appellants are the same as all other citizens in Tennessee. They have no interests which are not shared by other voters.

The appellants thus designate themselves by the use of abstract and theoretical legal phrases and seek to bring themselves under the protection of the Fourteenth Amendment.

Actually, the substance of the complaint is disproportionate legislative representation, denying the appellants a republican form of government. The appellants are asking this Court to take action which will result in the

remapping of the State of Tennessee. The objective is not the correction of a private wrong. The real objective is to induce action which will result in greater representation of the Tennessee municipalities in the halls of the General Assembly of Tennessee.

The appellants' zeal and their cloak of righteousness conceal neither their true identity nor the real nature of the action. They complain, not of discrimination, but of a wrong suffered by all of the voters of the State of Tennessee. **Colegrove v. Green**, 328 U. S. 549. Indeed, they bring the action for the benefit of all the voters of Tennessee (R. 4).

It is significant that the appellants fail to aver that they have a special interest in the subject matter or that their interest is greater than or different from that of other "qualified voters" in the State of Tennessee.

The proceeding is not, and cannot be, a class action.

The general right of every citizen to require a government according to law does not authorize a private citizen to invoke the jurisdiction of the Federal Courts for the purpose of determining the legality of legislative acts. **Fairchild v. Hughes**, 258 U. S. 126. A citizen is required to show that he has sustained, or is about to sustain, a direct injury. It is not enough to show a mere general interest shared by the public at large. **Ex Parte Albert Levitt**, 302 U. S. 633; **Jared v. Fitzgerald**, 183 Tenn. 682.

If the proceeding is to remedy a direct injury to the appellants themselves, then the injury is not one that is sustained "by all other voters in the State of Tennessee". If the injury is one sustained "by all other voters in the State of Tennessee", then there can be no direct injury to the appellants themselves.

B. The Municipalities, as Intervenors, Are Without Authority to Maintain the Action.

The individual appellants, the original plaintiffs, insist that the thrust of their suit is the violation of their individual voting rights, contrary to the civil rights statutes and the provisions of the Fourteenth Amendment.

The municipalities complain of the alleged unfair tax allocations.

The bald fact is that the individual appellants and the municipalities, which are arms of the State, are by this suit seeking to invoke the power of the Federal judiciary to remap the sovereign State of Tennessee. This doctrine is unsound.

Neither a municipality nor an officer of a municipality may maintain a suit such as this for the benefit of third persons, in this instance the taxpayers of the municipality. It is essential that the interest be of a personal and not of an official nature. **Braxton County Court v. West Virginia, ex rel. Dillon,** 208 U. S. 192; **Massachusetts v. Mellon,** 262 U. S. 447.

If the proceeding is to remedy a direct injury to the individual appellants themselves, then the municipalities cannot assist the individual appellants in maintaining the action. If the municipal intervenors are the parties who have sustained the injury, then the injury is not personal and direct and the individual appellants cannot maintain the action.

C. The Appellees Do Not Have Such Adverse Legal Interests to Pose a Real and Substantial Controversy.

The appellees are the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections.

The appellees are sued in their capacities as officers of the State of Tennessee. Thus, the suit is actually an action against the State of Tennessee and is barred under the doctrine of sovereign immunity.

If the Court finds that the action is not brought against the appellees in their capacities as officers of the State of Tennessee but against the appellees individually then the appellants cannot contend that the appellees are acting under color of the state statutes.

Actually, the appellees do not call or hold the elections for members of the Legislature. This subject is fully treated in Appendix A.

The elections are held by the county commissioners of elections in each of the ninety-five counties, and such commissioners are not parties to this suit. The county commissioners of elections are appointed by the State Board of Elections, but the latter has no control over them.

The Attorney General, the Coordinator of Elections, and the members of the State Board of Elections have no duties whatsoever in connection with holding elections for members of the Legislature. The Secretary of State has only minor duties in connection with the preparation of absentee ballots and the custody of poll books after the elections and after certificates of election have been issued.

If it is intended to bind the county commissioners of elections, the clerks, and judges of elections, the suit is barred, first, because it is an attempt to bind the State of Tennessee in violation of the doctrine of sovereign immunity and, second, because the officials sought to be bound are not before the court or represented in the case.

It is a well established principle that there can be no controversy and, thus no justiciable issue, in a case involv-

ing the holding of elections unless there are parties with adverse legal interests. **Smith v. Blackwell**, 115 F. 2d 186.

Although the appellants pray for an injunction against the enforcement of the apportionment statutes, the issues cannot be justiciable because the appellees have no duties to perform and consequently have not threatened to enforce the statutes.

If it is not intended to bind the county commissioners of elections, the clerks, and judges of elections, then a decree would settle nothing and would be purely advisory. Thus, there could be no controversy.

II.

THE DOCTRINE OF SOVEREIGN IMMUNITY INHIBITS A SUIT AGAINST THE STATE OF TENNESSEE.

This suit against the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections is a suit against the State of Tennessee.

The immunity doctrine is strictly applied in Tennessee. **Petty v. Tennessee-Missouri Bridge Commission**, 359 U. S. 275.

Under Article I, Section 17, Constitution of Tennessee, suits may be brought against the State only in such manner and in such courts as the Legislature may by law direct. Appendix B. The Legislature has not authorized suits against the State of Tennessee in the District Courts of the United States. Section 20-1702, Tennessee Code Annotated, Appendix B.

This Court has held that a suit against a public official of the United States in his official capacity is a suit against the United States. **Becker Steel Co. v. Cummings**,

296 U. S. 74, 78; **Cummings v. Deutsche Bank**, 300 U. S. 115, 118.

The same rule applies to suits against officials of the State of Tennessee. **Peerless Const. Co. v. Bass**, 158 Tenn. 518.

A state cannot be sued without its consent in a District Court of the United States by one of its own citizens. This is true even though the citizen alleges that the case arises under the Constitution or laws of the United States. **Hans v. Louisiana**, 134 U. S. 1, 17-18; **Ex Parte Young**, 209 U. S. 123, 150.

This Court has held that a suit to compel the officials of a state to refund taxes alleged to have been unconstitutionally collected was a suit against the state. **Ford Motor Company v. Department of Treasury of Indiana**, 323 U. S. 459.

In praying for relief against the appellee officials of the State of Tennessee, the appellants confuse the well settled rule that public officials can be **prohibited** from performing unconstitutional acts with the equally well settled rule that suits to **coerce** the acts of state officials are suits against the sovereign. (See **Governor of Georgia v. Madrago**, 26 U. S. 110; **New York Guaranty Company v. Steele**, 134 U. S. 230; **Cunningham v. Macon & Brunswick Railroad Company**, 109 U. S. 446.)

Are the appellants seeking to bind the officers of the State of Tennessee by decree of this Court? Or do the appellants seek a declaration which would **not** be binding upon the officers of the State of Tennessee?

If the appellants are seeking to bind the officers of the State of Tennessee by judicial pronouncement, then the suit is one to compel the appellees to perform an alleged official duty and the judgment, if rendered, would be co-

ercive, since it is intended to obtain legislative redress indirectly through the appellees.

If the appellants seek a declaration which would not be binding upon the officers of the State of Tennessee, the suit presents no "case or controversy" because the parties to be bound are not before the Court and because a decree, if rendered, would be a nullity.

In **Giles v. Harris**, 189 U. S. 475, Mr. Justice Holmes recognized this dilemma, and said:

> "The Circuit Court has no constitutional power to control its action by any direct means. . . . Unless we are prepared to supervise the voting in the State . . . it seems to us that all that the plaintiff could get from equity would be an empty form." 189 U. S. 488.

Thus, it is apparent that this is either an attempt to bind the purported election officials of the State of Tennessee, and thus the State of Tennessee itself, by judicial fiat, in which event this Court lacks jurisdiction because of the State's immunity to suit, or it is not an attempt to bind such officials, in which event the proceeding presents no "case or controversy".

III.

SINCE THE CASE INVOLVES ONLY PECULIARLY POLITICAL ISSUES, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE ACTION.

A. The Issues Are Wholly Political.

This Court has said that in determining whether a question is political and therefore not justiciable, the Court will consider

"the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination. . . ." **Coleman v. Miller**, 307 U. S. 433, 454-455.

Whether a question is political is to be determined not merely by abstract theory but by practical considerations.

The appellants, in Section XIV of the complaint, summarize their grievances as follows:

". . . that when all inequalities are taken together, the violations of the particular constitutional provisions set out above and as shown in Exhibits 'C' and 'D' **result in a distortion of the constitutional system as established, defined, and guaranteed** by the Constitution of the State of Tennessee and the Fourteenth Amendment to the Constitution of the United States; **that this distortion of our system** of electing representatives to the **General Assembly prevents it as it is now composed, from being a body representative of the people of the State of Tennessee** . . ."

". . . and that thus a minority now rules in Tennessee by virtue of its control of both Houses of the General Assembly, **contrary to the basic principle of representative government.** . . ." (Emphasis supplied) (R. 12, 13).

The appellants then pray for a declaration as to their rights and specifically ask the Court:

(1) To restrain the appellees from holding an election for members of the Tennessee Legislature under the present apportionment laws, and

(2) To direct the appellees to hold the next election for members of the Tennessee Legislature "on an at-large basis" (R. 19, 20).

Thus, the appellants, in the guise of citizens denied the right to vote, ask the Court to enforce the republican form of government in the State of Tennessee.

This Court has always held that the enforcement of the guaranty of a republican form of government is not a question properly falling within its jurisdiction. **Luther v. Borden,** 48 U. S. 1; **Pacific States Teleph. & Teleg. Co. v. Oregon,** 223 U. S. 118; **Ohio Ex Rel. Bryant v. Akron Metrop. Pk. Dist.,** 281 U. S. 74.

B. **Under the Constitution of Tennessee, Reapportionment Is a Question Solely for the Legislature.**

The Constitution of Tennessee specifically provides for three distinct divisions of the state government and prohibits the officers belonging to one division from exercising the powers belonging to another division.

The government consists of the legislative department, the executive department, and the judicial department. Article II, Section 1, Constitution of Tennessee, Appendix C. The legislative power is vested in a General Assembly consisting of two houses. Article II, Section 3. The executive power is vested in a governor. Article III, Section 1. The judicial power is vested in a supreme court and in such inferior courts as the Legislature may establish. Article VI, Section 1, Appendix D.

The Constitution of Tennessee specifically prohibits the officers in one division of the state government from exercising powers conferred on the other divisions. Article II, Section 2, Constitution of Tennessee, Appendix C.

The Supreme Court of Tennessee has held that it is essential to the maintenance of a republican form of government that the actions of the three departments be kept separate and distinct. **Richardson v. Young,** 122 Tenn. 471, 492-493.

Reapportionment must be made by the Legislature through the enactment of appropriate legislation. There is no provision in the Constitution of Tennessee or the statutes of Tennessee for the apportionment to be made by a board or commission. The matter is purely legislative.

The apportionment must be based, not on population, but on an enumeration of the qualified voters. Article II, Section 4, Constitution of Tennessee, Appendix C. The enumeration of the qualified voters necessarily entails the determination of the number of qualified voters in the assembly districts. The enumeration can only be authorized by, and conducted under the supervision of, the Legislature.

That the matter is purely legislative was recognized and emphasized by the District Court when it said:

> "The Constitution of the state vests the duty of making the enumeration in the legislature and not in the courts. Moreover, the redistricting of the state is required to be based upon an enumeration of the qualified voters and not upon population alone. The Court would have no way of knowing the number of qualified voters in the various districts. **Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state.**" (Emphasis supplied) (R. 218-219.)

Thus, the entire subject is legislative and peculiarly political.

C. Equity Is Without Power to Act, by Injunction or Declaratory Judgment, in Purely Political Matters.

By insisting that the Court is not barred from considering the question merely because it relates to political rights, the appellants wholly misconceive the issue.

The controlling question is not whether the Court will enforce an ordinary political or civil right. The decisive question is whether the Court will enforce the guaranty of a republican form of government in the State of Tennessee. This is a political right unique in nature.

The rule that equity will not interfere with state elections or intervene in purely political matters is fundamental.

In **Guaranty Trust Company of New York v. York,** 326 U. S. 99, the Court said:

> "Equitable relief in a federal court is, of course, subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." 326 U. S. 105.

Certainly the appellants would not seriously contend that a question such as the remapping of the State of Tennessee was within the traditional scope of the English Court of Chancery. Fuller-Weston, Political Questions, 38 **Harvard L. Rev.** 296, 302-304.

The rule applies even though the suit is brought under the Civil Rights Act. In **Giles v. Harris,** 189 U. S. 475, Mr. Justice Holmes said:

> "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of sec. 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.' They allowed a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not em-

braced a remedy for political wrongs. **Green v. Mills,** 69 Fed. Rep. 852." 189 U. S. 486.

The doctrine was fully considered in **Colegrove v. Green,** 328 U. S. 549.

In **South v. Peters,** 339 U. S. 276, the Court said:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

Of the five principal cases relied upon by the appellants to support jurisdiction of the subject matter, not one involves the power or jurisdiction of the Court to reapportion legislative seats or to enjoin the holding of an election. Each case was concerned with an entirely different question.

In **Nixon v. Herndon,** 273 U. S. 536; **Nixon v. Condon,** 286 U. S. 73, and **Smith v. Allright,** 321 U. S. 649, the actions were brought against election officials to recover damages for refusing to let the plaintiffs vote. In **Snowden v. Hughes,** 321 U. S. 1, the action was likewise one for damages but based on the plaintiff's alleged right to have his name placed on the ballot. **Terry v. Adams,** 345 U. S. 461, involved the right to vote in a party primary.

In each of these cases the Court was concerned with political rights but not with the peculiar political right to enjoy a republican form of government under Article IV, Section 4, Constitution of the United States.

D. The Declaratory Judgment Act Does Not Enlarge the District Court's Jurisdiction.

The provisions of the Declaratory Judgment Act do not enlarge the scope of Federal jurisdiction in election matters.

In **Aetna Life Insurance Company v. Haworth**, 300 U. S. 227, the Court held that the operation of the Act is procedural only and that it did not and could not declare a matter to be a "case" or "controversy" within the constitutional limitations on jurisdiction.

Where the subject matter is such that equity cannot protect the rights of the plaintiff by injunction because of a lack of jurisdiction, the Court is without jurisdiction to enter a declaratory judgment. **Great Lakes Company v. Huffman**, 319 U. S. 293; **Mine Safety Appliances Co. v. Forrestal**, 326 U. S. 371.

In **Colegrove v. Green**, 328 U. S. 549, the Court said that "the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction.'"

The principles of American jurisprudence have never contemplated that jurisdiction at law or in equity extends to elections and the supervising of elections. Although it is true that many state courts are empowered to hear election contests, it is likewise true that the judges who hear such cases are themselves subject to election. But the entire concept of federal constitutional jurisprudence rejects the principle that the Federal judiciary, independent of elections, should supervise the holding of elections. Since the Federal judiciary is independent of elections, elections must remain independent of the Federal judiciary. It was not by accident that this Court, in **Colegrove v. Green**, said that "It is hostile to a democratic system to involve the judiciary in the politics of the people."

IV.

THE ALLEGED CONTROVERSY DOES NOT INVOLVE RIGHTS PROTECTED UNDER EITHER THE FOURTEENTH AMENDMENT OR THE CIVIL RIGHTS STATUTES.

Although the appellants' complaint alleges discrimination, contrary to the provisions of the Fourteenth Amendment and the civil rights statutes, because of dilution of their votes, the gravamen of their complaint is the denial of the republican form of government.

Disproportionate legislative representation is not discrimination.

A. The Fourteenth Amendment Does Not Guarantee Equality of Voting Strength.

The appellants base their right to relief on the alleged dilution by the State of their **right to vote** and **the right to have their votes accorded equal weight with those of all other voters.** The violation of these rights, they say, is a violation of the provisions of the Fourteenth Amendment.

They do not assert that they have been denied the right to vote as was the case in **Nixon v. Herndon,** 273 U. S. 536; **Nixon v. Condon,** 286 U. S. 73; **Smith v. Allright,** 321 U. S. 649; and **Terry v. Adams,** 345 U. S. 461. Nor do they aver that their ballots were altered or that forged ballots have been placed in the ballot boxes, as in **United States v. Classic,** 313 U. S. 299, and **United States v. Saylor,** 322 U. S. 385.

The appellants have confused the present issue with the questions determined in the above cases. Consequently, the appellants have incorrectly charged a denial of their right to vote and the right to have their votes counted.

In contending that a federal right is involved, the appellants fail, indeed they refuse, to distinguish between the source of the privilege of voting for **members of the Legislature** and the privilege of voting for **members of Congress.** These are two distinct privileges, or rights, and are derived from different sources.

The right to vote for members of the Legislature is derived from the State of Tennessee.

In **Breedlove v. Suttles,** 302 U. S. 277, the Court said:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate." 302 U. S. 283.

This principle is not here in question. The appellants, on pages 12 and 13 of their jurisdictional statement, concede that the Constitution of the United States ". . . does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves."

On the other hand, the right to vote for **members of Congress** is derived from Article I, Section 2, Constitution of the United States. **Ex Parte Yarbrough,** 110 U. S. 651; **United States v. Classic,** 313 U. S. 299.

Thus, the right to vote for members of the Legislature and the right to vote for members of Congress are derived from different sources. This principle is incontrovertible.

Despite this clear distinction, the appellants assert that the dilution in strength of their votes for members of the state legislature is an infringement of their constitutional right to vote.

The cases in which this Court has said that the right to have one's vote counted is equivalent to the right to vote have been cases in which the appellants were actually denied their franchise in elections for members of Congress. **United States v. Classic**, 313 U. S. 299; **United States v. Saylor**, 322 U. S. 385.

The holdings in these cases do not rest on the Fourteenth Amendment, but on Article I, Section 2, Constitution of the United States. To the contrary the appellants assume what this Court has never held: that the right to vote for a member of the Legislature is a right protected by the Fourteenth Amendment. The appellants undertake to reach this position by assuming that because the failure to have one's vote counted in a Congressional election constitutes a violation of the Constitution of the United States, it necessarily follows that if one's vote is diluted, in an election for members of the Legislature, because of a violation of a state law or of a state constitution, this in itself constitutes a violation of the Fourteenth Amendment.

The fallacy of this premise is apparent. An act contrary to state law is not in itself a violation of the Federal Constitution. An act in violation of state law is not in violation of the Fourteenth Amendment unless it would be a violation of the Fourteenth Amendment in the absence of the statute.

In **Owensboro Waterworks Co. v. Owensboro**, 200 U. S. 38, the Court said:

> "The Fourteenth Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States." 200 U. S. 47.

If it is assumed that the appellants' votes are diluted, it does not follow that their rights under the Fourteenth Amendment have been infringed. Indeed, this Court has held that such rights are not infringed.

In **Snowden v. Hughes**, 321 U. S. 1, the Court said:

> ". . . The right to become a candidate for state office, like the right to vote for the election of state officers, **Minor v. Happersett**, 21 Wall. (U. S.) 162, 170-178, 22 L. Ed. 627, 629-631; **Pope v. Williams**, 193 U. S. 621, 632, 48 L. Ed. 817, 822, 24 S. Ct. 573; **Breedlove v. Suttles**, 302 U. S. 277, 283, 82 L. Ed. 252, 256, 58 S. Ct. 205, is a right or privilege of state citizenship, not of a national citizenship which alone is protected by the privilege and immunities clause." (Emphasis supplied.) 321 U. S. 6, 7.

Thus, the right to vote for members of the General Assembly of the State of Tennessee and the weight to be accorded that vote is purely a state right. The Fourteenth Amendment does not protect such right.

The appellants, having falsely assumed that a federal right is being violated, ask the Court for relief. In so doing they ask the Court to exercise its equity powers to protect a state right in a type of case in which the Court has said it would not exercise such powers to protect a federal right. **Colegrove v. Green**, 328 U. S. 549.

What standard is the Court to use in determining when discrimination exists and when it does not exist?

In **Wood v. Broom**, 287 U. S. 1, the Court held that in the absence of a requirement embodied in an act of Congress, it is not necessary that Congressional districts be composed of an equal number of inhabitants. As to Congressional districts, there is no requirement for equality of representation.

It is a fact that Congress has likewise failed to provide any standards for equality of representation in state legislatures. If Congress must set the requirements for equality of representation in Congressional districts, there is even greater reason for this Court holding that Congress must provide standards for equality of representation in legislative districts.

The determination that discrimination exists necessarily involves a finding that the constitutional requirements have not been met. By what standards are those requirements to be determined and who is to set the standard? It is no answer to say, as the appellants suggest, that the Court may find that discrimination exists without first determining what constitutes discrimination. In other words, the appellants ask the Court to pre-empt the powers of Congress and to legislate by fixing the standard.

B. **The Allegation of Discrimination Is Unfounded.**

The appellants' contention that there is a purposeful and systematic plan to discriminate against a class of persons is no more than a legal conclusion. Actually, the nub of their complaint is that because of the passage of time and increases and shifts in population, the General Assembly of Tennessee is not a representative body (R. 12, 13).

In bringing the suit on behalf of all voters in the State of Tennessee, the appellants admit that there is no particular class against whom discrimination is being practiced (R. 4).

As to the right to vote, the case is free of any purposeful discrimination against a class or individuals.

Discrimination is not, and cannot be, presumed. The element of purposeful or intentional discrimination must be shown. **Snowden v. Hughes**, 321 U. S. 1, 8.

This Court has refused to hold that the result of shifts in population and the passage of time amount to a dilution of voting rights sufficient to show intentional and purposeful discrimination under the provisions of the Fourteenth Amendment or the civil rights statutes. **Colegrove v. Green**, 328 U. S. 549; **Remmey v. Smith**, 342 U. S. 916; **Anderson v. Jordan**, 343 U. S. 912; **Kidd v. McCanless**, 352 U. S. 920; **Radford v. Gary**, 352 U. S. 991.

The appellants assert, on the one hand, that the alleged discrimination consists in denying them the right to vote and in failing to give proper weight to their ballots. They say, on the other hand, that the alleged discrimination goes, not to the question of voting, but to the question of the allocation of the burdens of taxation and the "unjust and unequal distribution" of tax funds (R. 16-18).

What is the discrimination? Is it the denial of the right to vote? Or is it the unequal distribution of tax funds?

If the alleged discrimination relates to the subject of taxation, it must involve either the allocation of the burdens of taxation or the distribution of tax funds. In either event, there is not, and cannot be, discrimination.

It is significant that the allegations in the complaint fail to claim discrimination relative to the allocations of the burdens of taxation. Whatever the tax may be—gasoline tax, sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes—there is no discrimination in the levying and collecting of it. All of the mentioned taxes are imposed in the same manner upon the voters and citizens in the large cities, the small villages, and the rural areas.

The citizen in Memphis, the state's largest city, pays the same gasoline tax, the same sales and use taxes, the same alcoholic beverage taxes, the same income taxes and

the same beer taxes, as the citizens in the state's least populous county. There is no difference whatsoever.

If the citizens of Shelby County, Davidson County, Hamilton County, and Knox County, the state's four most populous counties, pay more taxes than the citizens in a smaller county, it is because there are more citizens in the larger counties than in the smaller county. It is certainly not because the state tax rate is greater or the method of collection is different. Citizens pay their taxes as individuals and not as residents of a particular city or county.

Thus, there is no showing of discrimination of any kind in the levying and collecting of state taxes. The appellants do not even allege or charge that the so-called discrimination violates any right protected under the Constitution of Tennessee or the Constitution of the United States.

It is likewise true that there is no "unjust and unequal distribution" of tax funds. The appellants do not charge that the way and manner in which tax funds are distributed violates any constitutional provision.

This Court has held that a taxpayer cannot complain that a tax is discriminatory on the ground that it returns less to his town or county than he and the other inhabitants of the town or county pay. **Dane v. Jackson**, 256 U. S. 589; **N. C. & St. L. R. Co. v. Wallace**, 288 U. S. 249; **Carmichael v. Southern Coal & Coke Co.**, 300 U. S. 644. Mathematical equality in distribution has never been required.

It must be remembered that a state, composed of counties, is a governmental unit just as is the United States, which is composed of the several states. A tax collected by the State of Tennessee is used for the operation of the state government in the same manner a tax collected by the United States is used for the operation of the federal government.

It follows that tax funds used to construct and maintain a highway running from Bristol in northeastern Tennessee to Memphis in southwestern Tennessee, is for the use and benefit of all the citizens of Tennessee. In the same manner, tax funds collected by the United States from citizens of Maine or Oregon may be expended for governmental purposes in Illinois or New Mexico.

The same principle applies, and must apply, to the distribution of school funds. Contrary to the contention of the appellants, a child attending a two-room school in a rural area is as much entitled to the educational benefits afforded by the state government as is the student in one of Tennessee's larger cities. In each instance, the child is a future citizen, not alone of the county or city in which he resides, but of the State of Tennessee. The very purpose of government is to promote the welfare of its citizens.

How, then, can it be said that there is any discrimination in the distribution of tax funds?

To contend that the General Assembly of Tennessee, if constituted in a different manner, would distribute the state tax funds on a different basis, is purely speculative. The entire question of the collection and distribution of taxes is a governmental matter and thus peculiarly political.

The alleged discrimination is without foundation in law or fact.

C. The Civil Rights Act Amendments of 1957 Are Not Applicable to This Case.

The appellants initially insisted that they were entitled to relief under the provisions of the 1957 Amendment to the Civil Rights Act. Public Law 85-315, Part III, Sec. 121, 71 Stat. 637. The amendment simply states,

"To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

The intent of the Congressional amendment was fully discussed on pages 9 to 13 of the appellees' "Statement In Opposition To Appellants' Statement of Jurisdiction and Motion To Dismiss".

Since the gravamen of the complaint is the lack of a republican form of government in the State of Tennessee, and since the action is brought on behalf of all of the voters of Tennessee, the civil rights laws can have no application (R. 12-13, 4). Moreover, if the alleged discrimination relates to the collection and distribution of tax funds, it does not involve "the right to vote" (R. 16-18).

This Court has never treated complaints about state reapportionment as falling within the orbit of civil rights. Indeed, to interpolate into the provisions of the civil rights laws the question of unequal apportionment, "would be legislative action by judicial pronouncement". **Remmey v. Smith**, 102 F. Supp. 708, 712, appeal dismissed, 342 U. S. 916.

Actually, the appellants, on page 7 of their "Reply to Appellees' Statement in Opposition and Motion to Dismiss", concede:

"The injured voters are not urging the creation of any new rights. . . ."

If the appellants now concede that they are not claiming any new rights under the 1957 amendment to the Civil Rights Act, then the amendment, under the appellants' own admission, has no bearing on the question.

Therefore, the appellees urge that the appellants have failed to show discrimination under either the equal protection clause or the civil rights statutes.

V.

THE NEED FOR JUDICIAL ABSTENTION IS STRONGER HERE THAN IN CONGRESSIONAL REDISTRICTING CASES.

This Court has held in numerous cases that suits such as the present one cannot be maintained, that issues relating to the apportionment of members of state legislatures do not present substantial federal questions, and that the type of relief here prayed cannot be granted.

A. Colegrove v. Green Determined the Issues Adversely to the Appellants' Contentions.

In **Colegrove v. Green**, 328 U. S. 549, the question of the exercise of the equity powers of the Federal judiciary to correct an improper apportionment of the **Congressional districts** of Illinois was squarely presented.

When contrasted with the present case, **Colegrove v. Green**, alleged a dilution of voting rights derived from the Constitution of the United States, and not the Constitution of Illinois, since the right related to the election of members of Congress instead of members of the Illinois Legislature.

There, as here, the Illinois Legislature had failed to enact new apportionment legislation and shifts in population, with the passage of time, had resulted in unequal representation in Congress.

This Court refused to grant relief in the Colegrove case even though it involved the right to vote for members of Congress, a right derived from the Constitution of the United States.

The Court held that the issues presented were not only political but that they were "peculiarly political"; that

the wrong suffered was not a private wrong, but a wrong suffered by Illinois as a state; that the question was a question for the Legislature of Illinois and not for the Supreme Court of the United States; that since the issues were peculiarly political, it would be improper under our republican form of government for the Court to involve itself in politics; that our system of constitutional government precludes the intervention of the judiciary in such disputes; that a remedy exists and that the remedy is political in nature, namely, the election of legislatures that will enact apportionment legislation.

In his concurring opinion Mr. Justice Rutledge emphasized the question of the delicacy of federal-state relations and the grave consequences that could flow from the interference by the Supreme Court of the United States with the functions and duties of the legislature of one of the sovereign states of the Union.

In the dissenting opinion, Mr. Justice Black predicates his insistence that relief should be granted on the principle that **the right to vote for members of Congress** is a federal right since it is derived from Article I, Section 2, Constitution of the United States.

Thus, even the dissenting opinion recognized that if a federal right could be involved, it was because the case pertained to election of **members of Congress**, and that the right to vote for **members of Congress** is derived from Article I, Section 2, Constitution of the United States.

B. The Court Has Consistently Abstained From Reviewing State Legislative Apportionment Cases.

If the Court will not exercise its equity jurisdiction in a case involving the redistricting of a state for the purpose of electing members of Congress, there is even less reason

for the Court to grant relief in a case involving the apportionment of members of a state legislature.

That is precisely the position to which this Court has consistently adhered.

In **Turman v. Duckworth**, 329 U. S. 675, and **Cook v. Fortson**, 329 U. S. 675, the question presented was whether the county unit system of voting in Georgia deprived the plaintiffs of the equal protection of the laws. This Court ordered the District Court to dismiss the bill in each case.

Subsequently, the Court, in **MacDougall v. Green**, 335 U. S. 281, refused to exercise its jurisdiction where an Illinois statute required a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties. The Court referred to **Colegrove v. Green**, supra, and held that the statute was not in violation of the Fourteenth Amendment.

Georgia's county unit system of voting was again challenged in **South v. Peters**, 339 U. S. 276. This Court affirmed the District Court's action in dismissing the petition and said:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

In **Cox v. Peters**, 342 U. S. 936, another assault was made upon Georgia's county unit laws, and it was insisted by the petitioner that his vote had not received its full value in violation of the equal protection clause of the Fourteenth Amendment. The motion to dismiss was granted for want of a substantial federal question.

In **Remmey v. Smith**, 342 U. S. 916, the District Court had refused to enjoin the enforcement of the Pennsylvania

apportionment laws, and had rejected the insistence that those laws violated the due process and equal protection clauses. This Court granted the motion to dismiss the appeal on the ground that it presented no substantial federal question.

The question of the geographical distribution of electoral strength was next before this Court in **Anderson v. Jordan**, 343 U. S. 912, on an attempted appeal from the decision of the Supreme Court of California. The appeal was dismissed on the authority of **Colegrove v. Green**, supra; **MacDougall v. Green**, supra; and **Wood v. Broom**, 287 U. S. 1.

In **Kidd v. McCanless**, 352 U. S. 920, the appeal involved the identical apportionment statutes now before the Court. The appeal was dismissed on the authority of **Colegrove v. Green**, supra, and **Anderson v. Jordan**, supra.

This Court affirmed the District Court's dismissal of the action in **Radford v. Gary**, 352 U. S. 991, where it was contended that the Oklahoma apportionment laws were in violation of the Constitution of the United States. The Court cited **Colegrove v. Green**, supra, and **Kidd v. McCanless**, supra.

The Court likewise refused to consider the question of geographical distribution of electoral strength in **Hartsfield v. Sloan**, 357 U. S. 916. The Court was of the opinion that the motion for leave to file a petition for writ of mandamus to compel the District Judge to assemble a three-judge court to pass on the validity of the Georgia county unit law should be denied.

In **Remmey v. Smith**, **Kidd v. McCanless**, and **Radford v. Gary**, the issues were the same as in the present case. In each instance it was insisted that the failure of the legislature to enact reapportionment legislation impaired the plaintiffs' voting rights, and that such impairment

was an infringement of the plaintiffs' rights under the Fourteenth Amendment and the federal statutes. In each instance the Court rejected such contentions.

Indeed, as to **Kidd v. McCanless**, the District Court has held that the issues in the present case are identical with the issues in the Kidd case (R. 216).

In rejecting the appeal in **Kidd v. McCanless**, the Court cited **Colegrove v. Green.**

In affirming the judgment of the three-judge District Court in dismissing the complaint in **Radford v. Gary**, the Court cited **Kidd v. McCanless** along with **Colegrove v. Green.**

Can it be seriously contended that this Court has not reached the issues presented by the present appeal? Has not the Court said that such actions cannot be maintained? Has not the Court held that issues relating to the apportionment of members of state legislatures do not present substantial federal questions? Has not the Court ruled that the type of relief here prayed cannot be granted? It is respectfully submitted that the Court has not acted erroneously in deciding the foregoing cases.

Wherein do the issues now presented differ from those previously presented?

The appellants assert that this case presents issues relating to individual rights. Were the "rights" any the less "individual" in the cases arising in California, Georgia, Pennsylvania, and Oklahoma? The individual rights asserted in **Kidd v. McCanless** are the same individual rights urged in the present case, and the District Court so held.

The appellants contend that in this case it can be shown that the failure of the Legislature to enact new apportion-

ment legislation is deliberate. If the failure to enact such legislation is deliberate, then the same situation existed in **Remmey v. Smith, Kidd v. McCanless**, and **Radford v. Gary.** This assertion by the appellants is no more than the statement of a legal conclusion.

The appellants assert that in this case there is a "declared constitutional policy" relative to the apportionment. The same was true in **Remmey v. Smith.** Article II, Section 18, Constitution of Pennsylvania. The same was true in **Anderson v. Jordan.** Article IV, Section 6, Constitution of California. The same was true in **Radford v. Gary.** Article V, Sections 9 (a) and 10, Constitution of Oklahoma. The same provisions of the Constitution of Tennessee which were before the Court in **Kidd v. McCanless** are before the Court in the present case.

The issues here presented have been before this Court on numerous occasions and have been determined adversely to the appellants' contentions.

The District Court was correct in finding that the issues in the present case are the same as those previously presented to this Court (R. 216-217).

When the appellants insist that this case presents issues not yet passed upon by this Court, they wholly misconceive the issues.

If the circumstances in **Colegrove v. Green**, involving the election of **members of Congress**, did not present a case where relief could be granted, then the present case, involving the election of **members of a state legislature**, cannot present a case where relief can be granted.

VI.

THE EXERCISE OF THE COURT'S EQUITY POWERS WOULD SERIOUSLY DISRUPT, IF NOT DESTROY, THE GOVERNMENT OF THE STATE OF TENNESSEE.

A declaration by this Court that Tennessee's apportionment laws are unconstitutional would seriously disrupt, if not destroy, the government of the State of Tennessee.

That the effect of such a declaration must be carefully considered was recognized both by the District Judge and the three-judge District Court (R. 93-94, 217).

In **Kidd v. McCanless**, 200 Tenn. 273, certiorari denied, 352 U. S. 920, the identical apportionment statutes and the identical state of facts with respect to apportionment of legislative seats in Tennessee were considered by this Court. The three-judge District Court found such to be true and specifically so held (R. 216).

The Supreme Court of Tennessee, in the Kidd case said:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282 (R. 65).
>
> "It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the de facto doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only not have any existing members of the General As-

sembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly." 200 Tenn. 281 (R. 65).

That this Court would decree the present apportionment laws to be unconstitutional is unthinkable.

If the State of Tennessee is denied a legislature, or is denied a legislature elected according to the provisions of the Constitution of Tennessee, the State cannot issue bonds; cannot lawfully collect taxes; cannot lawfully make expenditures for the operation of the schools and other governmental purposes; and cannot operate its courts, prisons, and other institutions.

In **Luther v. Borden**, 7 How. 1, this Court said that if it held a state government to be operating unconstitutionally, it would result in the holding that:

"'. . . the laws passed by its Legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals."

These serious consequences at the outset were glibly thrust aside by the appellants but are now minimized by a feeble attempt at rationalization.

The appellants assert **that in their view** this Court need not accept the holding of the Supreme Court of Tennessee that the invalidation of the present apportionment laws would prevent the Legislature from functioning in a de facto capacity to enact new apportionment legislation.

In sharp contrast to the appellants' view, this Court, in a Tennessee case, has held that it would and should

accept the holding of the Supreme Court of Tennessee relative to de facto bodies. In **Norton v. Shelby County**, 118 U. S. 425, the Court said:

> "No federal court should refuse to accept such decisions as expressing on these subjects the law of the State." 118 U. S. 440.

The implications to be drawn from the Kidd case are far-reaching and lead inescapably to the conclusion that this Court should not attempt to interpret the apportionment provisions of the state constitution. The Supreme Court of Tennessee must have concluded that the provisions are not self-executing. Moreover, the state court did not find that the provisions are mandatory in the sense that the Legislature could be compelled to follow them. If the Supreme Court of Tennessee did not implicitly so conclude, then its decision in the Kidd case could not have been rested upon the de facto doctrine. If the state constitutional provisions are neither self-executing nor mandatory (and only the Supreme Court of Tennessee can decide these propositions) how can it be said that the 1901 apportionment statutes are invalid under any theory, or violate any federally protected right?

This Court has said that "Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent' ". **American Federation of Labor v. Watson**, 327 U. S. 582, 593. If this is the policy of this Court as to state laws generally, what should the policy of the Court be as to state apportionment laws which affect the very life-blood of the state governments?

The Supreme Court of Tennessee has held that if the present apportionment laws are declared to be unconstitutional,

> ". . . we would not only not have any existing members of the General Assembly but we would have

no apportionment act whatever under which a new election could be held for the members to the General Assembly." 200 Tenn. 281 (R. 65).

Thus, the basic framework of constitutional government in Tennessee would be destroyed. Where such a result may be contemplated, it is inconceivable that the appellants would pursue the matter to the extent of asking this Court to destroy the government of the State of Tennessee.

What more serious question involving a state constitution could there be?

VII.

THE REMEDIES SUGGESTED BY THE APPELLANTS ARE NEITHER FEASIBLE NOR LEGALLY POSSIBLE.

The weakness of the appellants' case is emphasized by their contentions relative to the question of relief. The Court should not be misled by the appellants' chameleon-like approach to the subject.

In the complaint the appellants pray for a declaration as to their rights and specifically ask the Court:

(1) To restrain the appellees from holding an election for members of the Tennessee Legislature under the present apportionment laws, and

(2) To direct the appellees to hold the next election for members of the Tennessee Legislature "on an at-large basis" (R. 19, 20).

Then, in their jurisdictional statement, the appellants suggested two remedies which are somewhat different from the prayers in the complaint. First, they say the Court could enjoin the holding of any future election under the present apportionment laws. Second, they sug-

gest that the Court could find that a violation of appellants' rights have occurred, and consider at a future date the question of relief.

Now, in their brief on the merits, they propose still other and different remedies. *They ask for temporary relief.* They suggest that this Court remand the case to the District Court with directions to vacate the order of dismissal. They say that the District Court could keep the case on the docket, and then at some indefinite time in the future, that Court "might" issue an injunction or it "might" make a declaration.

None of the suggested remedies is sound.

The appellants cannot successfully disguise the nature of the remedies sought. They ask, as the complaint clearly shows, for an injunction to prevent the holding of an election for members of the Tennessee Legislature, or for an order to require the officials of the State of Tennessee to hold such an election on an "at-large-basis."

To enjoin the holding of any future election for members of the Legislature under the present laws would mean that the State of Tennessee would have no legislature whatsoever.

It is apparent that an election at large would be contrary to the provisions of the Constitution of Tennessee. In **Kidd v. McCanless**, the Supreme Court of Tennessee said:

> "There is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn. 277.

The District Court held that since the Constitution provides for members of the Legislature to be elected from counties and districts, they obviously cannot be elected at large. The Court said:

"Practical considerations also are heavily weighted against such a remedy. It would lead to serious geographical inequities and other discriminations, probably to a greater extent than those presently existing. It would require the Court not only to provide for the supervision of the entire election but also to devise detailed rules and regulations under which such election should be held, a task which the courts are not equipped to undertake. Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate" (R. 218).

Of equal importance is the rule that Federal courts of equity will not interfere with the enforcement of state laws except ". . . to prevent irreparable injury which is clear and imminent." **American Federation of Labor v. Watson**, 327 U. S. 582, 593. This case presents no irreparable injury and certainly none which is clear and imminent. The injury is suffered by all of the citizens of Tennessee. Indeed, the appellants bring the action "on behalf of all other voters of the State of Tennessee" (R. 4).

Even in dissenting opinions, this Court has recognized that Federal courts should be most hesitant to enjoin the holding of state elections. In **MacDougall v. Green**, Mr. Justice Douglas pointed out that:

"Federal courts should be most hesitant to use the injunction in state elections. See Wilson v. North Carolina, 169 U. S. 586, 596, 42 L. Ed. 865, 871, 18 S. Ct. 435. If federal courts undertook the role of superintendence, disruption of the whole electoral process might result, and the elective system that is vital to our government might be paralyzed. Cf.

> Johnson v. Stevenson, 170 F. 2d 108. The equity court, moreover, must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." 335 U. S. 290.

And in **South v. Peters**, 339 U. S. 276, 280, Mr. Justice Black considered the question of the supervision of an election by the Court.

That the cure might be worse than the disease was pointed out by the District Court when it said:

> "It would lead to serious geographical inequalities and other discriminations, probably to a greater extent than those presently existing" (R. 218).

An injunction could not be issued without a finding by the Court that the present apportionment laws are unconstitutional. As previously indicated, the result would be the destruction of the legislative branch of the state government. **Kidd v. McCanless**, 200 Tenn. 282. This grave problem was recognized by the District Court:

> "In view of this decision, the plaintiffs recognize that the Court, if it declared the existing apportionment statute unconstitutional, would be required to go further and devise an appropriate remedy so as to avoid a disruption of state government" (R. 217).

The issuance of an injunction would be impractical and contrary to all existing equitable principles.

The second plan suggested by the appellants is likewise unsound.

If the Court determines that it is without jurisdiction to issue an injunction, then it must likewise determine that it is without authority to make a declaration of the type suggested by the appellants. In **Colegrove v. Green**, 328 U. S. 549, the Court said:

". . . the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction.'" 328 U. S. 552.

If the Court determines it has no jurisdiction to issue an injunction, then a declaration that a violation of appellants' rights had occurred would be an effort on the part of the Court to do indirectly what it is saying it cannot do directly. This, the Court has said, it will not do. **Colegrove v. Green**, 329 U. S. 549, 555.

A declaration by the Court that a violation of appellants' rights have occurred would be nothing less than a declaration that the present apportionment laws are unconstitutional, and thus, in effect, a holding that the government of the State of Tennessee is operating illegally. All activities of the state government would be adversely affected, and the result could be disastrous.

Thus, neither of the suggested remedies is feasible or legally possible.

If this Court finds that there is no justiciable issue as to either the appellants or the appellees, the appeal should be dismissed. The Court must determine whether the District Court has jurisdiction of the subject matter. If the District Court does have jurisdiction, it cannot make a declaration of rights unless this Court will direct the District Court to grant specific equitable relief.

To remand the case without instructions would be nothing less than political coercion. This Court should not clothe a political strategem with the cloth of legal respectability.

VIII.

THE REMEDY LIES WITH THE ELECTORATE AND NOT WITH THE JUDICIARY.

The appellants assume that if an injury can be shown, it necessarily follows that the Court can grant relief. They also assume that they have exhausted all avenues of relief.

Neither of these assumptions is correct.

To assume that equity will grant relief merely because an injury is shown, is to assume the law to be what it has never been. For instance, cases involving marital difficulties, especially where children are concerned, are of great social and moral importance. Nevertheless, neither law courts nor equity courts can grant divorces or effect adoptions in the absence of statutory authority.

In **Guaranty Trust Company of New York v. York**, 326 U. S. 99, the Court said:

> "Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." 326 U. S. 105.

Again, in **Colegrove v. Green**, 328 U. S. 549, the Court emphasized the principle that the courts are not authorized to grant relief merely upon the showing that a constitutional provision has been violated:

> "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But

the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin**, 24 How. (U. S.) 66, 16 L. Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson**, 4 Wall. (U. S.) 475, 18 L. Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon**, 223 U. S. 118, 56 L. Ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

Thus, it does not follow that if the appellants have suffered an injury, the Court will grant relief.

Peculiarly political questions must, as the Court said in **Colegrove v. Green**, be settled in the political arena.

The appellants do not represent a weak segment of the population or a minority group. On the contrary, they aver that they represent the more populous sections of the state. The case does not present a situation where the appellants are without the means of self-help. Compare **Edwards v. California**, 314 U. S. 160, 174. They themselves vote, are represented in the Legislature, and have the means with which to arouse the public feeling which will ultimately result in the achievement of the goal they seek. As this Court said in **MacDougall v. Green**, 335 U. S. 281, 284:

> ". . . the latter have practical opportunities for exerting their weight at the polls not available to the former."

If the remedy for unfairness in **Congressional representation** is at the polls, as this Court has said, the remedy

for inequality of representation in state legislatures is likewise at the polls.

In **Colgrove v. Green**, the Court said:

> ". . . the remedy ultimately lies with the people." 328 U. S. 552.
>
> "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." 328 U. S. 556.

To say, as this Court said in **Colegrove v. Green**, that

> "It is hostile to a democratic system to involve the judiciary in the politics of the people" (328 U. S. 553-554);

is merely another way of saying what the Court said in **Minersville School Dist. v. Gobitis**, 310 U. S. 586,

> "To fight out the wise use of legislative authority in the forum of public opinion . . . serves to vindicate the self-confidence of a free people" (310 U. S. 600);
> "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained . . . when it is ingrained in the people's habits and not enforced . . . by the coercion of adjudicated law." 310 U. S. 599.

The events occurring in Tennessee in recent years, and now a matter of record in Tennessee's basic law, do not support the appellants' assertion that all avenues of relief are closed to them. Tennessee's present constitution was adopted in 1870. It remained unamended for more than eighty years, despite the fact that many efforts were made to have the Tennessee Legislature authorize a constitutional convention. However, when the desire of the public became sufficiently great the Legislature authorized the holding of the convention. The convention was held in

1953 and the Tennessee constitution was amended. The authorization for the holding of the convention was brought about by an aroused and enlightened public.

The same goal can, and will, be achieved in connection with reapportioning legislative seats.

To suggest, as do the appellants, that no avenue of relief is open is to suggest that the citizenry of Tennessee is incapable of self-government. This postulate we unequivocally reject.

.....

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Certificate of Service.

I, George F. McCanless, Attorney General of Tennessee, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served

copies of the within Brief for Appellees on Charles W. Baker et al., appellants, by mailing said copies in a duly addressed envelope, postage duly prepaid, to their counsel of record, namely:

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APPENDIX A.

THE APPELLEES DO NOT HOLD ELECTIONS FOR MEMBERS OF THE LEGISLATURE.

The appellees, the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections, do not call or hold the elections for members of the Legislature.

The elections for members of the Legislature are held by the county commissioners of elections in each of the ninety-five counties. The county commissioners of elections are not parties to the action and are not represented in the suit.

The State Board of Elections is composed of three members who are elected by the Legislature for a term of six years. Sections 2-901 and 2-905, Tennessee Code Annotated, provide as follows:

> "2-901. Board of elections—Election of members. —There shall be elected, in the manner herein provided, three (3) persons to be known as the board of elections for the State of Tennessee, which shall exercise all the powers conferred by this chapter."

> "2-905. Date of election—General assembly members voting.—The election of said members of the board of elections shall be held every six (6) years beginning with the year 1953, by a joint resolution of both houses of the general assembly, and the election shall take place in a joint session of both houses of the general assembly in which each member of said general assembly shall be entitled to one (1) vote.

> "Provided, further that elections choosing members of the board of elections shall be held on any date fixed by joint resolution of both houses of the general

assembly, but shall be held prior to the first Monday in March, of the year in which the legislature meets."

The State Board of Elections does not hold elections. Its duty is to appoint a board of three commissioners of elections for each of the ninety-five counties. Section 2-1001, Tennessee Code Annotated, provides as follows:

"2-1001. Appointment of county election commissioners.—The board of elections of the state of Tennessee shall appoint, on the first Monday in April, each odd year, three (3) commissioners of elections for each county, to serve for a term of two (2) years and until their successors are appointed and qualified."

The State Board of Elections does not supervise the actions of the several county commissioners of elections, and it is not authorized to do so.

After appointing the county commissioners of elections for a particular county, the State Board of Elections has no other duties or responsibilities in connection with the holding of elections in that county except to fill any vacancy that may occur on the county board. Section 2-1004, Tennessee Code Annotated, provides as follows:

"2-1004. Term—Vacancies—Filling.—Said commissioners shall hold their office until their successors are appointed, and any vacancy shall be filled by the state board of elections by appointment."

Candidates for the Legislature must file their qualifying papers with the county commissioners of elections. No other board or commission is authorized to receive and file such qualifying papers.

In order to have his name placed on the ballot, a candidate for the Legislature must qualify with the county commissioners of elections in one of two ways. His name

may be certified as nominee of a political party or he may file a petition signed by at least twenty-five qualified voters, as an independent candidate. Sections 2-1205 and 2-1206, Tennessee Code Annotated, provide as follows:

"2-1205. Names to be placed on ballots—Duties of chairman of board of election commissioners.—The ballots printed for use under the provisions of this chapter shall contain the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, or other assembly of any political party in this state at least thirty (30) days previous to the day of election. It shall be the duty of the chairman of the commissioners to have printed all necessary ballots for use under the provisions of this chapter, and he shall cause to be printed upon said ballots the names of candidates so nominated, upon the written request of any one of the candidates so nominated, or upon the written request of any qualified voter who will affirm that he was a member of said caucus, and the name presented by him was the nominee of said caucus, convention, or mass meeting, or other assembly, of any such political party.

"In counties where voting machines are used the ballot shall contain the names of nominated candidates who have been nominated by caucus, convention or mass meeting or other assembly of any political party in the state at least twenty-five (25) days before the date of election. This shall be given to chairman of election commission or to the secretary.

"2-1206. Independent candidates—Petition to place name on ballots—Filing.—The said officer shall cause to be printed upon said ballots the name of any qualified voter who has been requested to be a candidate for any office, by a written petition signed by at least twenty-five (25) citizens qualified to vote in the elec-

tion to fill said office, when such petition has been given him at least thirty (30) days previous to the election.

"Where a petition is required to be filed in more than one (1) county, certified duplicates of such nominating petition duly attested under oath to be correct by one of the signers thereof shall be sufficient to be filed with the respective county election commission in lieu of the original but the original thereof shall be filed with the county chairman of at least one (1) of the counties participating in such election. The attested signatures of one of the signers referred to, may be a photo copy of the signatures of the original petition."

The officials who actually conduct the elections are appointed by the county commissioners of elections. Section 2-1101, Tennessee Code Annotated, provides as follows:

"2-1101. Officials conducting elections—Vacancies on board—Filling.—All elections shall be opened and held by the officers, judges, and clerks of elections, appointed by the commissioners of elections, according to law, and if any of said officers, judges, or clerks shall fail to attend, other persons shall be selected to fill such vacancy by a majority of the election officers in attendance."

After the election has been held, the county commissioners of elections are required to issue certificates of election to the successful candidates and to certify and forward to the Secretary of State one copy of the poll books. Thereafter the Governor also issues certificates of election to the winning parties. Sections 2-1414 to 2-1416, Tennessee Code Annotated, provide as follows:

"2-1414. Certificate of election for members of general assembly—Transmission of vote to secretary of

state.—The person receiving the highest number of votes for member of the general assembly shall be declared duly elected, and a certificate of election issued to him, and a statement of the vote made out and transmitted immediately to the secretary of state."

"2-1415. Copy of poll books in all elections for legislature forwarded to secretary of state.—In all senatorial and representative districts, it shall be the duty of the commissioners of elections of each county, within ten (10) days after said election, to certify and forward to the secretary of state one (1) copy or set of the poll books."

"2-1416. Certificates of election issued to members of legislature.—When the results of such election shall have been ascertained and announced, the governor shall issue certificates of election to the persons receiving the largest number of votes in said district, which certificates shall be prima facie evidence in such election; and the commissioners of elections of the several counties, singly electing one or more representatives, shall issue certificates of election to the persons receiving the largest number of votes cast at said election."

Thus, the members of the State Board of Elections have no duties whatsoever in connection with the calling and holding of elections for members of the Legislature.

The Secretary of State, as shown above, has certain minor duties after the elections are held. He has no duties in connection with the holding of the elections. He is required, under the provisions of Section 2-312, Tennessee Code Annotated, to furnish to the several counties forms and supplies for the preliminary registration of voters. His only other duties relate to the preparation of absentee

ballot forms. Section 2-1607, Tennessee Code Annotated. He certainly does not call or hold elections for members of the Legislature.

The Election Coordinator's duties involve training programs for newly appointed election officials, the interpretation of election law questions, and the preparation of manuals of the election laws. He has no duties in connection with the holding of elections for members of the Legislature. Section 2-111, Tennessee Code Annotated.

The Attorney General of Tennessee has no duties whatsoever in connection with the holding of elections for members of the Legislature.

APPENDIX B.

CONSTITUTION OF TENNESSEE.

Article I.

Sec. 17. Open courts—Redress of injuries—Suits against the State.—That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

TENNESSEE CODE ANNOTATED.

20-1702. Actions against state prohibited.—No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

APPENDIX C.

CONSTITUTION OF TENNESSEE.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

APPENDIX D.

CONSTITUTION OF TENNESSEE.

Article III.

Section 1. Governor's executive power.—The Supreme Executive power of this State shall be vested in a Governor.

Article VI.

Section 1. Judicial power.—The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF FOR APPELLANTS

Appellants feel that, with the exception noted below, the principal arguments of appellees set out in their brief, received March 17, 1961, have been thoroughly met in the brief for appellants and the brief for the United States as amicus curiae, without need for further elaboration.

Appellees have raised three technical arguments (at pp. 14-20 of their brief) relating to the status of the parties plaintiff and defendant, upon which comment may be useful, since the points may not have been dealt with in the earlier briefs in the form presented.

THE STANDING OF APPELLANTS

The appellees argue that the action is being brought on behalf of all voters in the State of Tennessee, that the proceeding is not, and cannot be, a class action, and that the objective is not the correction of a private wrong (Appellees' brief, pp. 14-16).

Appellees overlook the fact that the action was brought by ten named plaintiffs, residents and voters of five counties (Shelby, Davidson, Hamilton, Knox, Montgomery), and that the complaint states that "they bring this action on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated." (R 6, and, to like effect, R 12, 16, 18). This is an easily discernible class.

Intervener, Ben West, came in as an individual citizen and voter of one of the five counties, Davidson County (R 103), and additionally on behalf of all the residents of the City of Nashville in Davidson County (R 104). Motions by the cities of Chattanooga and Knoxville to intervene were buttressing actions to indicate that the citizens of these two cities, in the counties of Hamilton and Knox respectively, "are members of the same class of citizens and residents of the State of Tennessee who have been deprived of fair and adequate representation in the General Assembly of the State of Tennessee as the original plaintiffs herein" (R 97). Thus the interventions do not destroy the individual standing of the plaintiffs, but serve to reinforce their allegation that the plaintiffs do, in fact, speak for not only themselves but for a class of similarly situated citizens and voters who have likewise been discriminated against. Such interventions are entirely

in keeping with the role that cities and other public bodies may play in assisting the assertion of the individual rights of their residents, typically in rate hearings, see Re *Engelhard and Sons Co.*, 231 U.S. 647, 651, or for their welfare generally, *Missouri* v. *Illinois*, 180 U.S. 208, 221.

As the District Court below made clear, we are dealing here with the deprivation of voting rights of individuals; and the precedents support vindicating such rights by injunctive relief or by declaratory judgment, or both, at the instance of one or more individuals on behalf of themselves and a larger class. Useful examples are *Terry* v. *Adams*, 345 U.S. 461; *Smiley* v. *Holm*, 285 U.S. 355; *Hawks* v. *Smith* (No. 1), 253 U.S. 221; *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), *cert. denied* 333 U.S. 875. The District Court judgment in *Rice* v. *Elmore*, 72 F. Supp. 516, 528 (DC SC 1947), affirmed as above, granted a declaratory judgment in a class action "that the plaintiff and others similarly situated are entitled to be enrolled and to vote in the primaries. . . ."

The United States, as amicus curiae, supports the standing and personal interest of the appellants in the action and relief sought, saying:

> "The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters," which ". . . cannot logically be treated as a 'public' wrong so as to deprive the victim of standing."
>
> (Amicus brief, filed March 14, 1961, p. 21; and see pages 20-22 inclusive)

THE STATUS OF THE APPELLEES

The appellees argue that this action can not be maintained because of the sovereign immunity against suit of the State of Tennessee (Appellees' brief, pp. 17, 18-20), and because the appellants have named as defendants state officers who do not call or hold the elections for members of the legislature (Appellees' brief, pp. 16-18).

Sovereign Immunity Inapplicable.

The question of sovereign immunity was not raised below by the motion to dismiss (R 46, 47), and we doubt the propriety of this Court considering the contention. *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241, 249; *DeSylva* v. *Ballentine*, 351 U.S. 570, 582.

Nevertheless, looking at the merits of the contention, Tennessee's argument is that the suit is against officers of the State of Tennessee and as such is thus actually against the State of Tennessee and barred by sovereign immunity. But this question of the interplay between the Eleventh Amendment and rights under the Fourteenth Amendment was settled long ago adversely to Tennessee's argument. A good example is *Ex Parte Young*, 209 U.S. 123, where, drawing on earlier precedents, the Court pointed out that "it is settled doctrine of this Court that a suit against individuals, for the purpose of preventing them as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that [11th] Amendment." 209 U.S. at 154.

The Court went on to hold that:

> "The Act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." 209 U.S. at 159.

The Court then pointed out that the state has no power to impart to the officials any immunity from responsibility to the supreme authority of the United States. In making the officer of the state a party defendant to a suit to enjoin the enforcement of the alleged unconstitutional act, the Court noted that the fact that the state officer, by virtue of his office, has some connection with the enforcement of the act is the important and material fact. 209 U.S. 157.[1]

In *Sterling* v. *Constantin*, 287 U.S. 378, 393, this Court held that an injunction against a state governor and other officials forbidding enforcement of an unconstitutional statute was not a suit against the state within the provisions of the Eleventh Amendment, saying:

> "[W]here state officials, purporting to act under state authority, invade rights secured by the Fed-

---

[1] For cases comparable to *Ex Parte Young*, see *Allen* v. *Baltimore and Ohio R. Co.*, 114 U.S. 311; *Reagan* v. *Farmers Loan and Trust Company*, 154 U.S. 362; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110.

eral Constitution, they are subject to the processes of Federal courts in order that the persons injured may have appropriate relief."

In *Cooper* v. *Aaron*, 358 U.S. 1, 17, the Court held that "the prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the State taking the action." Thus, the provisions of the Fourteenth Amendment coupled with federal enforcement powers mean that the "agency of the State, or of the officers or agents by whom its powers are exerted," *Ex Parte Virginia*, 100 U.S. 339, 347, who participate in denying to the Tennessee appellants and other voters similarly situated, their rights under the Fourteenth Amendment to an equal vote in state elections, may be enjoined by the federal courts from so doing. This is true regardless of the fact that the appellees act in the name of the State of Tennessee and are clothed with that State's power. "Every State official, high and low, is bound by the Fourteenth Amendment." *United States* v. *Raines*, 362 U.S. 17, 25.

Congress has specifically provided, by action at law, suit in equity, or other proper proceeding, for redress of denials of Fourteenth Amendment rights in Federal District Courts where the denial is under color of state law, 42 U.S.C. 1983, 28 U.S.C. 1343; *Monroe* v. *Pape*, No. 39, Oct. Term, 1960, decided February 20 1961. It is this remedy which appellants pursue.

The Question of Proper Parties Was Correctly Deferred and Is Not Now Before This Court.

Appellees contend that the appellants have failed to join "indispensable" parties to the suit, to wit, the

county commissioners of elections of each of the 95 counties of Tennessee, and that the present appellees have no functions in respect of calling or holding elections for members of the legislature (Appellees' brief, pp. 17-18).

After the complaint was filed the first and only pleading filed by the appellees was a motion to dismiss which, like a demurrer at common law, admits all of the well pleaded facts of the complaint. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 340. The motion to dismiss raised as one of three grounds the question of failure of appellants to include alleged indispensable parties (R 46, 47). This question was specifically deferred by the District Court (R 220). As we point out hereinafter, we believe that the matter is not before the Court on this appeal, that its determination is unnecessary to the appeal, and that the District Court must itself dispose of the matter, at a later stage, before this Court would or should consider it.

With respect to the parties actually made defendants, paragraph IV of the complaint states that the defendant, Joe C. Carr, the Secretary of State, is charged with the duty of furnishing blanks, envelopes, and information slips to the county election officials, certifying the results of elections and maintaining the records thereof, and, together with the Governor and Attorney General, has the duty of examining the election returns received from the county commissioners, and declaring the election results (R 4).

Continuing, defendant George G. McCanless, the Attorney General, is charged with the duty of advising the officers of the State, has the duty, together with the Governor and Secretary of State, of declaring

election results, and, under the Tennessee Code, is a necessary party defendant in any declaratory judgment action where the constitutionality of a statute of Tennessee is attacked (R 4).

Defendant Jerry McDonald is the Co-ordinator of Elections of the State and is charged with the election duties set forth in the 1959 Public Law creating his office (R 4-5).[2]

Defendants Dr. Sam Coward, James Alexander, and Hubert Brooks are the members of the State Board of Elections and have the duty of appointing the election commissioners for all of the counties of the State and "the organizing and supervising of the biennial elections as provided by the Statutes of Tennessee,

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[2] The 1959 Act, Tennessee Code Annotated (1960 Cumulative Supplement) Title 2—Elections, provides:

"2-110. Coordination of elections—Appointment of coordinator.—The secretary of state shall designate or appoint a person in his office to coordinate election activities throughout the state of Tennessee. [Acts 1959, ch 148, § 1.]

"2-111. Duty to interpret questions of law, prepare election laws manual and train officials—Term—Compensation.—The person designated or appointed in 2-110 shall interpret or have interpreted questions of law for the benefit of local or county election officials with a view toward uniformity of election procedures throughout the state. He shall be charged with the duty of keeping up to date the election laws manual heretofore prepared by the secretary of state, and may prepare more condensed handbooks for the use of election officials. He shall review our state election laws, note discrepancies, and conflicts therein and suggest amendments thereto from time to time as the occasion arises. He shall perform such other duties as the secretary of state shall prescribe, and shall serve at the pleasure of the secretary of state and for such compensation as the secretary of state shall determine in keeping with the policies of the staff division of personnel for such or similar positions. [Acts 1959, ch. 148, § 2.]"

Chapter 9, of Title 2 of the Tennessee Code Annotated, § 2-901, et seq." (R 5).

The complaint further alleges that the action is brought against the aforenamed defendants in their representative capacities, and that said election commissioners are sued also "as representatives of all of the county election officials in the State of Tennessee", such persons being so numerous as to make it impracticable to bring them all before the Court; that common relief is sought against all members of said election commissions in their official capacities, it being the duty of the county election commissioners, within their respective jurisdictions, to perform the several enumerated acts concerned with the holding of elections in the counties (R 5).

Thus, for the purposes of this appeal, the appellants have joined as parties defendant all of the officials who apparently have any functions in connection with the calling and holding of elections, and have brought in the alleged missing county election commissioners through the representation of them by the State Board of Elections, in order to avoid an impracticable situation of joining several hundred additional defendants.[3]

Whether or not this joinder of the county officials by representation is sufficient for the purposes of an ultimate decree by the District Court is a matter which will have to be determined by the District Court at the appropriate time, probably with the benefit of a

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[3] The plaintiff City of Knoxville (R 222) in its petition to intervene listed the names and addresses of the three election commissioners of Knox County and requested that the Court make them parties defendant in the cause (R. 258-259). The Court did not reach the issue respecting parties defendant (R 220).

hearing on the merits.[4] If there is a defect, it is curable by amendment.[5] In that posture this Court has said:

> "Since the defect may be cured by amendment, and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made, and dispose of the case. *Norton* v. *Larney,* 266 U.S. 511, 515, 516, 69 L. ed. 413, 415, 416, 45 Sup. Ct. Rep. 145; *Howard* v. *De Cordova,* 177 U.S. 609, 614, 44 L. ed. 908, 910, 20 Sup. Ct. Rep. 817."
>
> *Realty Holding Co.* v. *Donaldson,* 268 U.S. 398, 400.

Because the determination respecting a full complement of parties is subordinate to and not necessary

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[4] Ruling on a motion to dismiss for non-joinder of an indispensable party may be deferred, as was done here, if resolution of the question depends upon facts and circumstances that can better be determined at a hearing on the merits. Barron and Holtzoff, FEDERAL PRACTICE AND PROCEDURE, Sec. 357, Vol. 1A, pp. 390-391; *Reid* v. *Reid,* 269 F. 2d 923 (CA 10, 1959); *Van Kirk* v. *Campbell,* 7 FRD 231 (DC NY 1947). Under Rule 12(b), of the Rules of Civil Procedure, the defense remains until judgment is entered. BARRON AND HOLTZOFF, *supra,* sec. 518, Vol. 2, p. 99.

[5] If it should appear to the District Court that certain parties ought to be added or others dropped, the District Court has ample authority under Rule 15 of the Rules of Civil Procedure to make the necessary amendments. See, for example, *the City of Orangeburg* v. *Southern Railway Company,* 45 F Supp 734 (DC SC 1942), affirmed 134 F 2d 890; *Messelt* v. *Security Storage Co.,* 11 FRD 342 (DC Del 1951); *Brown* v. *Dunbar and Sullivan Dredging Co.,* 189 F 2d 871 (CA 2, 1951); *McGrath* v. *Tadayasu Abo,* 186 F 2d 766 (CA 9, 1951), cert. den. 342 U.S. 832. A complaint will not be dismissed for failure to join an indispensable party where the defect can be cured, *Rosen* v. *Texas Co.,* 161 F Supp 55 (DC NY 1958).

now for the resolution of the larger question before this Court respecting assumption of jurisdiction, and is not a mete subject before this Court at this time, the appellees cannot be heard to debate the election functions of the various defendants in the light of the allegations of appellants admitted by the motion to dismiss. Clearly, in that posture, these defendants are within the stated rule of *Ex Parte Young, supra,* 209 U.S. at 157, that "the state official, by virtue of his office, has some connection with the enforcement of the Act."

Respectfully submitted,

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JAMES R. BROWNING, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 6

CHARLES W. BAKER, ET AL.,
Appellants,

VERSUS

JOE C. CARR, ET AL.,
Appellees.

J. HOWARD EDMONDSON, Governor of Oklahoma,
Amicus Curiae.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF J. HOWARD EDMONDSON, GOVERNOR OF THE STATE OF OKLAHOMA, AS AMICUS CURIAE

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September, 1961.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

J. Howard Edmondson, Governor of Oklahoma and attorney *pro se*, hereby respectfully moves that this Court permit him to file a brief in this case *amicus curiae* pursuant to paragraph one of Rule 42 of the Rules of this Court. Numerical paragraph four of Rule 42 may be indirectly applicable.

The grounds for this motion are as follows:

Applicant was elected Governor of the State of Oklahoma by a substantial majority with reapportionment of the State Legislature as one of the principal points in his

platform; that he speaks for a substantial majority of the citizens of the State of Oklahoma who are not adequately and fairly represented in the State Legislature and who consequently are being discriminated against as a result of the existing malapportionment; that the rights of said citizens and of Appplicant will be affected and determined by any decision of this Court in the above named action; that this petition is based upon the ground of the necessity of informing the Court of facts and situations which may have escaped its consideration and to remind the Court of legal matters which may not be brought to its attention, and such other grounds as are more fully set forth in the brief attached hereto.

The Appellants have consented to the filing of a brief *amicus curiae* by this Applicant, but the Appellees hav refused consent.

WHEREFORE, Applicant respectfully prays that he be accorded permission to file a brief *amicus curiae* in order to present arguments and viewpoints on the matters involved in the case which the parties themselves may not present, said brief accompanies this motion.

Respectfully submitted,

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Dated September 5, 1961.

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BRIEF OF J. HOWARD EDMONDSON, GOVERNOR OF THE STATE OF OKLAHOMA, AS AMICUS CURIAE

To The Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now J. Howard Edmondson, Governor of the State of Oklahoma, and respectfully submits that he speaks for a class which consists of in excess of seventy per cent of the citizens of the State of Oklahoma who are under represented in the State Legislature in varying degrees. Prior to the last legislative session certain voters in the State of Oklahoma had a vote with a strength in excess of thirty-three times that of other voters in the nomination and election of State Senator. As a result of most recent

unconstitutional Apportionment Act the disparity from one county to another is fourteen to one in selecting a State Representative.

Applicant was elected Governor of the State of Oklahoma in 1958 on a program of which one of the principal planks was reapportionment of the Legislature. The margin of victory was the greatest in the history of the State. Subsequent thereto Applicant requested the Legislature to reapportion according to the Constitution or in the alternative to submit a reasonable reapportionment measure to the people. This failed, in 1959 and again in 1961 although the 1961 Legislature did reapportion both the Senate and the House ignoring the constitutional mandate but granting some change which, if allowed to stand by the courts where it is now under attack, will afford negligible relief to the more populous counties.

As Governor of the State of Oklahoma Applicant has observed the operation of the lawmaking branch of government and the effect thereon of the malapportionment that exists and has concluded that by various and devious methods the legislation resulting has discriminated against the under-represented areas to the extent that urban needs are critical and state needs of a general nature have been allowed to suffer by the apparent concern for certain rural needs.

Applicant further submits that there appears to be no relief from this situation other than which may be afforded by the United States Supreme Court since the Legislature has failed to act according to the Constitution. The initiative procedure has become hopelessly bogged

down as is more fully detailed hereafter. The United States District Court and the Oklahoma Supreme Court have failed to afford relief heretofore.

MALAPPORTIONMENT RESULTS IN DISCRIMINATION AND THREATENS CLEAR AND IMMINENT IRREPARABLE INJURY

Democracy is engaged in mortal combat throughout the world with atheistic communism, consequently the deterioration of representative government so widespread in the legislatures of our sovereign states must be halted. Whereas, some 10 per cent of our people are directly affected by segregation, over 70 per cent of Oklahomans are being defrauded of their equal ballot. This figure is apparently similar to the condition in Tennessee and other states. Legislative malapportionment without question is the cause of rural local government looking to the state capital for its wants and urban local government looking to Washington for solution to the urgent problems confronting it.

With the State running county affairs and the federal government engaged in urban and state affairs, state affairs and federal affairs both suffer.

From 1950 to 1960 Federal matching funds to Oklahoma grew 50 per cent faster than Oklahoma's own funds increased.

No major decision can be made today on relief or highway matters without complying with federal rules.

The failure of local government to support urban needs is made further apparent by the introduction of S. 1633 in the United States Senate, creating a new cabinet post

to be known as the Department of Urban Affairs and Housing to handle urban needs. Furthermore, the Senate Government Operations Committee has ordered S. 1633 favorably reported, although said report had not as yet been filed, at last report.

Two out of every three residents of the United States now live in urbanized areas, with half of these urbanites living in suburban regions outside central cities. It is estimated that virtually all population growth of the next two decades will be in suburban portions of metropolitan areas. By 1980, about 75 per cent of the nation's population is expected to live in urbanized areas; the urban population will number about 180 million persons, and, be equivalent to the nation's total 1960 population.[1]

On the local scene Oklahoma gives 40 per cent of its fuel taxes to its 231 County Commissioners. Over 93 per cent of all funds County Commissioners receive for county roads are state taxes. Only the small balance is raised at the local level. By the same token federal funds of a similar amount are used by the State to build intrastate and interstate highways.

Nearly one-half of the nation's motor travel now occurs on city routes that account for only 10 per cent of total highway mileage. This urban travel will more than double over the next two decades, while rural highway travel will increase about 30 per cent. By 1980, about 60 per cent of the anticipated 1,277 billion yearly vehicle

[1] "Future Highways and Urban Growth" prepared by Wilbur Smith and Associates, nationally known traffic engineers, dated February, 1961, under commission from The Automobile Manufacturers Association, pages iii and 200.

miles of travel will be within expanded urban area limits.[2] But county government in Oklahoma receives twelve times as much of our fuel tax as cities and towns, while 70 per cent of our people live in incorporated municipalities.

Distribution of gasoline taxes to our County Commissioners in Oklahoma is enlightening in that it shows a trend directly contrary to traffic growth and obvious need. At first it was divided 40 per cent on population, 30 per cent on area and 30 per cent on road mileage. By evolution the factors have been changed by the Legislature on newer taxes to eliminate all consideration of population in cities of over 5,000 including the first 5,000. Likewise the rural legislature prescribed use of an outdated census in determining population after it was replaced by a new federal census. As cities expand, the county road mileage likewise decreases without any compensating increase in city tax apportionments. Thus the areas with the greatest new needs are actually being penalized for growing.

Our 1959 Legislature decided to give one-third of all alcoholic taxes to cities and towns when it submitted repeal of prohibition (the repeal amendment restricted place of sales to inside cities and towns) on the announced policy that policing problems created would be a municipal responsibility. But our rurally dominated Senate couldn't quit. It wrote in a provision that distribution to the cities and towns be made through County Commissioners with equal consideration given to population and the area of the county. Why a town of 5,000 in a county small in area should receive less than a town of 5,000 in a county large in area is impossible to determine; for that matter, why

[2] "Future Highways and Urban Growth," page v.

area of a county should be a factor in municipal needs defies explanation. As a result per capita benefits are 25 times as great in cities and towns of one county as in another. Is it not significant that the citizens of the favored county have 14 times the vote in House representation and 9⅓ times the Senatorial vote of the unfavored county?

Appellees state at page 32 of their brief that all pay the same tax. It is submitted this is false in Oklahoma and probably in Tennessee. Ad valorem taxes are generally the basis of local government revenues. Appraisals on which they are based vary in Oklahoma from 12.41 per cent of true value in one county to 25.44 per cent in another county according to latest Oklahoma Tax Commission reports. The poorly assessed county has six times the legislative voting strength of the higher assessed county. The same report points out that 61 of our 77 counties are below the state average.

As local revenues decrease state revenues must be stepped up to replace them. Our state school aid program began as aid only for needy areas supplementing any shortage of ad valorem taxes to meet local needs. But as aid began, some choose to rest at the local level and state aid picked up the thus increased need. This created a desire on the part of others to shift the burden to the statehouse. By subtle provisions as to how the aid is to be provided, the net result is that underrepresented areas receive only the residue after requests of overrepresented areas are provided.

Likewise when County Commissioners using state funds can improve rural roads and roads within smaller towns, there is a discrimination in requiring urban areas to pay

special assessments to construct streets or higher water, sewer or other similar charges to operate city government, which includes road maintenance.

Thus an obvious discrimination can and does exist and citizens are not paying the same tax.

At page 37 of their brief Appellees state:

> "If the Court will not exercise equity jurisdiction in a case involving the redistricting of a state for the purpose of electing members of Congress, there is even less reason for the Court to grant relief in a case involving the apportionment of members of a state legislature."

It is submitted this statement is also contrary to fact. The state legislatures have been the guilty parties in congressional redistricting. In Oklahoma, two congressmen each represent more than twice the people that another congressman does. The legislative districts encompassed in the large congressional districts are generally underrepresented, whereas those in the smaller congressional districts are overrepresented substantially.

This problem will be effectively resolved in states with equal legislative representation. So contrary to Appellees' contention there is obviously far more reason for the Court to act on legislative reapportionment than on congressional redistricting. It is far better for the courts to "slay the dragon than only to cut off one of its many heads."

In 1943 the Oklahoma Supreme Court in *Jones* v. *Freeman*, 146 P.2d 564 at 569 said of the 1941 apportionments:

"The condition thus shown to exist is one of grave concern. The principle of equality of representation lies at the very heart of representative government. 18 Am. Jur. 192, §17. This principle was enjoined upon the Legislature by the cited constitutional provision. At the ballot box, in a representative government, each citizen is supposed to be, and should be the equal of every other citizen and all are entitled to approximately an equal vote in the enactment of laws through elected Representatives. It was not the intention of the framers of the Constitution, or of the people who adopted it, that citizens of one county should have representation in the two Houses of the Legislature out of all proportion to that enjoyed by the citizens of other counties, except in the few instances above noted.

"The Kentucky court has well said: 'Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayer is distributed, and the power to make and measure the levy of taxes, are so essential, all inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself.' Stiglitz v. Schardien, 239 Ky. 799, 40 S. W. 2d 315, 321.

* * * * * * *

" The Kentucky court, in Stiglitz v. Schardien, above, in a case where the inequality was not so great as in

> Oklahoma, used this language, which is pertinent here: 'The inequality is so glaring that it repels any presumption that the legislation constituted a fair approximation of what was required by the fundamental law. It represents an instance where fair-minded men can entertain no doubt that the inequality of representation is grave, unreasonable and unnecessary'."

and at 571:

> "But a citizen has more than the mere right to have his own county or district fully represented in the Legislature. Discrimination may result from giving other counties too much representation as well as from giving a particular county insufficient representation. Each citizen has a right to have the state apportioned in accordance with the provisions of the Constitution, and to be governed by a Legislature which fairly represents the whole body of the electorate, elected as required by the provisions of the Constitution. Stiglitz v. Schardien, above; State v. Wrightson, above."

and at 572:

> "This problem, created by lack of power on the part of the courts to affirmatively enforce constitutional provisions relating to apportionment, has not been confined to Oklahoma alone. Overrepresentation of the less populous areas has been the rule, rather than the exception, among the other states of the Union. And that Legislatures have been traditionally slow to enact apportionment statutes meeting the requirements of State Constitutions is evidenced by the great number of reported cases on the subject. See 2 A.L.R. 1337, note. The overrepresented counties and districts simply do not relinquish the advantage they possess. They fight to retain it."

Unfortunately, in spite of these findings, the Oklahoma Court ruled it didn't have the power to act.

Appellees argue at page 47 of their brief that the Federal Courts of equity will not interfere with the enforcement of state laws except "to prevent irreparable injury which is clear and imminent."

It is submitted that irreparable injury to democracy itself is clear and imminent. When minority rule so distorts our whole governmental structure as to have state government stand mute on such grave local problems as are being defaulted to the federal government, democracy itself is in jeopardy. Problems assigned to the federal government, such as defense and international relations are grave enough alone to command the undivided attention of Congress and the federal government.

It cannot be argued with convincing logic that local government when truly representative cannot handle its own problems better than they can be handled for them by unknown people removed from the scene by from hundreds to several thousands of miles.

But there can be no question that local government is not truly representative. It is in the shackles of malapportionment.

There likewise can be no question that not only does discrimination exist, but that irreparable injury to democracy, representative government and the very moral fiber of our people is clear and imminent.

COURT ACTION CAN AFFORD RELIEF

Oklahoma has a situation very similar to that in Tennessee insofar as legislative apportionment is concerned.

But thanks to the "Tennessee case" coming before this Honorable Court a modicum of relief may have been granted our more populous counties.

Both rural and urban Senators and Representatives repeatedly publicly pressed for reapportionment by the Legislature to "prevent the Federal Courts doing it" throughout the legislative session just completed. The urban legislators asked generally for compliance with their constitutional oath to enforce the Constitution. With significant exceptions others sought to circumvent the clear intent of the Constituion as well as possible Federal Court action by their actions.

The threat of court action, now only on the distant Tennessee horizon, but augmented by a case pending in the United States District Court for the Western District of Oklahoma and a damage suit against legislators and others by citizens residing in the Northern District, caused the first complete apportionment of our Senate since statehood although our Constitution, like that of Tennessee, requires action each ten years after a Federal census.

Unfortunately, the result was clearly unconstitutional and is under attack in the State Supreme Court. However, it did increase the minimum per cent of people who can nominate and elect a majority of our Senate from 23 per cent to 27 per cent. The most flagrant disparity in Senate voting strength was reduced from 33-1 to 11-1.

However, this can hardly be said to comply with the constitutional mandate that senatorial "districts shall contain as near as may be an equal number of inhabitants" (Art. V, Sec. 9(a) Oklahoma Constitution). The minority still rules although as a result of this action, if it stands, it will take a few more people and Senators to compose this ruling minority.

The apportionment plan in Oklahoma's Constitution provides a Senate based on population and a House based partially on area and partially on population.

The new senatorial apportionment, without any constitutional basis whatsoever, added one Senator to a favored rural district. These two Senators representing said district will represent the third and fourth fewest people of any Senator. The seven other Senators added by this act are within constitutional limitations. The failure lies in not consolidating many overrepresented districts and adding the additional Senators to the two larger counties. For example, Oklahoma and Tulsa Counties each nominated and elected one Senator. The act provides for three each. The Constitution would give 8 and 6 respectively. The act provides 52 Senators, the Constitution would give us 54. Thus the politically impossible job of consolidating districts to eliminate six incumbents and rearranging all other districts was avoided, and while constitutionally the two cities could have been given two more Senators without eliminating incumbents the Legislature didn't even afford this less painful relief.

Insofar as the House is concerned the Legislature was last apportioned according to the Constitution in 1921. The

1961 legislative session did two things—shift some six representatives from six overrepresented middle-size counties to six underrepresented middle-size counties and submit a constitutional amendment to special vote on September 12 which legalizes this apportionment and throws a sop of a total of six additional representatives to the two largest counties to attempt to procure votes.

Whereas, under the Constitution a majority of Representatives represent 34 per cent of our population, under the statutory provision 29 per cent would be represented by a majority. The constitutional amendment submitted would, if adopted, cause 31 per cent currently to govern. Without the recent amendment some 26 per cent elected a majority.

Thus this Court action can be credited with causing an improvement in Oklahoma's House representation from 26 to 29 per cent and in the Senate from 23 to 27 per cent. It clearly shows that the retention of jurisdiction is a potential source of relief alone. It may be the spur that will give fair representation throughout the country. It confirms contentions of Appellants and results reached in New Jersey (*Asbury Park Press* v. *Wooley*, 33 N.J. 1, 161 A.2d 705), Minnesota (*Magraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184 and 197 F. Supp. 803) and Hawaii (*Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220).

But conversely it apparently shows that court action must be certain if full relief is to be granted.

INITIATIVE DOES NOT AFFORD EFFECTIVE RELIEF

The initiative is cited as a means of relief in those states having it. *Radford* v. *Gary*, 352 U.S. 991, is distinguished on this basis and in theory this is a sound distinction. As a practical matter it is at most a possible means of relief but extremely impractical.

In the first half of Oklahoma's history some 49 initiative measures reached the voting stage, whereas only 19 have in the last half of our history. Of those 19, only five school measures which were voted upon at two elections held during and immediately after World War II were adopted. In the last 15 years, over one-fourth of the State's history, *none* have succeeded. (Appendix of Title 34, Oklahoma Statutes Annotated.) It is significant that school forces are a tremendously powerful political influence. No other group or groups though, including dry, repeal, municipal, Republican Party, better roads, or reapportionment groups have been successful.

One weakness lies in the inability to amend a petition after it is filed. Various groups favoring the end result don't agree on the means, and instead of joining forces to attain the desired result, as is customary in legislative processes when the time for amendment ends, those that would otherwise be proponents continue to argue.

The other factor which practically neutralizes initiative as a means of relief is the huge job involved now.

The Oklahoma Constitution (Art. V, Sec. 2) has been interpreted to require 15 per cent of those voting at the last general election (November, every other year) to sign

petitions to submit a constitutional amendment. It is recognized that a constitutional amendment which establishes a procedure to enforce the constitutional mandate is requisite to provide reapportionment in Oklahoma. This means the signatures of 135,473 properly registered voters must be signed to a petition, properly attested, gathered together, filed, and finally sustained as to validity to submit a change in our reapportionment procedure.

A complicated system of review of validity of signatures is first imposed on the Secretary of State and then *de novo* on the State Supreme Court, where other legal questions may also be raised. After that a Governor has in effect a veto by refusing to submit an initiated measure at a special election, since such measures voted on at general elections must receive a majority of all votes cast at the election regardless of whether many voters vote only for President, Governor or Sheriff and not on the submitted question. The "silent vote" can thus effectively kill such a measure.

The organizational effort and expense of printing, circulating, gathering, submitting and securing favorable rulings on such measures is tremendous—but probably the most difficult obstacle is the campaign. Whether we like it or not, in our busy lives, political considerations must compete with a myriad of other responsibilities. Executive, legislative and judicial officials seldom "learn the ropes" of their job overnight. Pity the poor citizen asked to understand as complex a problem as reapportionment.

In Oklahoma, he was told it eliminated homestead exemption, reduced pension checks, stopped school buses, eliminated rural road care, abolished a number of county

seats, gave veto power to the two largest cities, helped labor, hurt labor, and a number of other untruths and half-truths.

Then such organizations as the League of Women Voters who had championed reapportionment for years said that the submitted measure which allowed every county a representative was all wrong. The Farm Bureau, while claiming it favored reapportionment wanted to ignore the basic difference between state and federal governments and pattern on the federal plan of Senators for Counties as well as a Representative for every county. Other groups said the plan provided too many legislators, others said it wasn't representative enough.

If he lived in the rural areas he was led to distrust anyone in a city or town. If he lived in a town, he suspicioned anyone in a city, and if he lived in a middle-sized city, he was told falsely that this was just a big city scheme to control all government. Naturally those residing in cities resent the unfair advantage of those in rural areas much as any "have nots" are jealous of the "haves." Division of our people has been one of the unfortunate by-products of legislative malapportionment.

It is obvious that the tug and pull of all the pressure groups, the confusion among the supposed friends of reapportionment and other distractions unfortunately included in the same special election left the poor confused voter with no choice but to follow natural instinct when confused and vote "No."

Almost a year has elapsed since the reapportionment election, and no new petition has been initiated. There

has been much talk, but the argument continues as to the contents of any new petition. Regardless of what the next petition contains many sincere supporters of fair representation will probably oppose it and many selfish interests will distort its purpose and results. The people will again be confused and no relief accomplished.

Our neighboring State of Colorado had two reapportionment petitions initiated although their voting disparity is not nearly as great as in Oklahoma. The first was initiated by the Cattlemen's Association, the second by urban people. Both failed.

Thus, while initiative appears to offer sound relief, as a practical matter it has become progressively more inadequate. Apparently this is caused by the increasing expensiveness of the procedure, the difficulty of explaining increasingly complex proposals, and even more from the lack of compromising and amendatory processes that are such a fundamental part of legislation.

CONCLUSION

The time has passed when the question of reapportionment can be left to our legislatures. The gross discriminations and the legislatures' refusals to comply with constitutional mandates is a blight infecting democracy and distorting governmental functions between the various levels of government. The time has passed when this Court can logically consider this even a discretionary matter in equity. This principle has failed to produce the proper results. This Honorable Court has the power to act. If

truly representative government is to survive, this Honorable Court offers the only apparent hope. This Court is the last resort. It might even be said this Honorable Court is now duty bound to act!

Respectfully submitted,

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No. 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

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SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

On oral argument of this cause, April 19-20, 1961 (No. 103, October term 1960), the Court asked a number of questions. Appellants believe that written answers or materials covering practically all of the points are found in appellants' brief and reply brief filed February 21 and April 6, 1961, respectively, and in the brief of the Solicitor General for the United States as amicus curiae filed March 14, 1961.

However, because of the form which two of the

items took, it may be useful to reorient some of the material in direct response thereto, in aid of the forthcoming reargument of the case in October, 1961.

I

The question was asked, of what bearing on the federal constitutional right asserted by appellants are the provisions of the Tennessee Constitution (providing equality in voting rights, proportionate representation in both houses of the legislature, and the scheme of decennial reapportionment to assure such equality)?[1]

The pertinent provisions of the Tennessee Constitution constitute part of the facts and legal background in determining, in relation to the Fourteenth Amendment, the intended meaning of voting rights in Tennessee, the extent of the violation of those rights, and the standard or measure for remedial action in restoring the rights violated.

Appellants asserted their federal rights under the Fourteenth Amendment, with particular stress on the guarantee of equal protection of the laws with respect to appellant's voting rights under the laws of Tennessee. This federal guarantee is one against invidious discrimination by the state in the provision for such voting rights and their exercise by appellants.

The right to vote is a right which springs from state law, but subject to federal oversight in assuring that the citizens are equally protected in the operation of the state law. In understanding the voting

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[1] The answering materials and pertinent cases in appellants' brief of February 21, 1961, are at pp. 23-34.

right created and judging the equality of operation of the state law, the courts examine the totality of state action. This includes state constitutional provisions where such exist.

Thus, where the organic law of the state (as here) provides for all of its citizens (who meet certain age and residence requirements) equal voting rights in a system of proportional representation for both houses of the legislature, the voting rights in that state have taken on a measured meaning, which is obviously within the parameters of the Fourteenth Amendment, though that Amendment did not compel adoption of that particular measure and might allow some other reasonable measure, if changed by appropriate action.

But, the people of the state having organically provided in this manner for voting rights and what is meant by "equality" therein, a gross distortion (as here), begun and maintained by the state legislature, which excessively favors some voters by diluting the votes of appellants and others similarly situated, is outside any legislative discretion conferred by the state constitution, and at the same time makes unreasonable classifications of voters which violate the equal protection guaranty of the Fourteenth Amendment. The violation of the Fourteenth Amendment would be demonstrable by its grossness without the aid of the state constitutional provisions, if these did not exist. But because they exist, the state constitutional provisions assist in demonstrating that on its face the inconsistent legislative action (Act of 1901) is discriminatory, unequal treatment.

By the same token, these state constitutional provisions provide the courts with a yardstick which save

the courts the more difficult judgment of determining in the case of this state (as distindt from cases which might arise in other states) how much of a departure from mathematical equality the Fourteenth Amendment permits, and what is a suitable standard for compliance in judging remedial action to be taken by the state.

It was suggested in oral argument by Mr. Justice Frankfurter that a tax case involving the Tennessee constitutional provision respecting uniformity of taxation (*Nashville C&S Ry.* v. *Browning*, 310 U.S. 362) indicated that it would make no difference in dealing with the discrimination alleged here whether Tennessee had written something into its constitution or not. The state constitutional provision in *Browning*, Tenn. Const. Art. 2, sec. 28, provided in pertinent part that "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State".

The Court held that this provision (which, it may be noted, confers discretion to classify) did not stand in the way of state administrative (or legislative) action classifying and distinguishing railroad property from other property for purposes of taxation, and such action did not offend the equal protection clause of the Fourteenth Amendment, for it was not charged that the state had singled out the railroad company from among other railroad corporations for special invidious treatment.

Thus, the *Browning* case merely illustrates the classic interpretation of the equal protection clause which does not require rigid uniformity in the appli-

cation of the state taxing power to all persons and corporations, but admits of state taxing action grounded upon reasonable classifications of such persons and corporations and the kinds of property involved.

The case supports the proposition that where persons within the classifications are treated unequally, a violation of equal protection under the Fourteenth Amendment does occur. This is the situation here. There is no rational basis for distinguishing rural votes from urban votes on a 10 to 1 or 20 to 1 ratio in state-wide elections for representatives of a legislature which purports to represent the qualified voters in proportion to their numbers. Arguably, the Fourteenth Amendment might, under some hypothetical and differing set of facts of which we are not aware, admit of such classification because of an alleged rational or reasonable basis for it. But the provisions of the Tennessee Constitution, which are part of the existing facts, make it clear to the legislature and to the courts that there is no rational, reasonable basis for such a classification of voters and voting rights in Tennessee; that there is but a single class of voters in state-wide elections, and the attempt to treat some in the class less favorably than others results in a violation of the equal protection clause of the Fourteenth Amendment.

II

It was argued by appellees that appellants' action seeks enforcement of the guaranty of a republican form of government in Tennessee, and that if the Federal District Court were to declare the 1901 Tennessee Apportionment Act unconstitutional, this would be of

necessity a determination that the government of Tennessee is and has been operating unconstitutionally, that all of the past acts of the legislatures since 1901 would fail, and there would be a current lack of legislation under which to operate the state government.

This is another way of stating the *in terrorem* argument that the state would be destroyed, made by the Tennessee Supreme Court in refusing to give the necessary relief in *Kidd* v. *McCanless*, 200 Tenn. 282.[2]

It is most important to remember that this suit is grounded upon the Fourteenth Amendment, not Article IV section 4 of the Constitution; and that the complaint does not challenge the existence or validity of the past or present governments or legislatures of Tennessee, or the incumbency of any legislator to sit and act. The attack and relief sought is against the continued use in the future of the Act of 1901 as the basis for choosing members of succeeding legislatures.

The distinctions are important, for if as was suggested at the oral argument, appellees would draw on *Luther* v. *Borden*, 7 How. 1, as support to deny jurisdiction or its exercise here, it cannot be overlooked that the inquiry, as proposed by the plaintiff in that case, was whether the so-called charter government of Rhode Island, which declared martial law and caused injury to plaintiff's civil rights, was in legal existence during that period, or whether a competing state government was lawfully in existence. The Court said that if it entered upon the inquiry as proposed by the plaintiff, and decided that the charter government had

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[2] This argument, and the place of the *Kidd* case in this lawsuit, are dealt with at pp. 42-44 of appellants' brief of February 21, 1961.

no legal existence during the past period of time, then the laws passed by the legislature during that time were nullities. The Court decided that the question of which of two competing state governments was the lawful government was for the political department of the federal government (the President and the Congress) and not for the courts; and that Art. IV, section 4, of the Constitution, guaranteeing to each state a republican form of government, had placed the function of recognition with Congress and not with the courts.

This lawsuit, which invokes the guaranties of the Fourteenth Amendment in protecting from invidious discrimination the individual voting rights of appellants by declaring invalid or enjoining for future use the Tennessee Apportionment Act of 1901, seeks relief of a nature which is a commonplace in judicial tradition and which looks to the future rather than the past.

It is fundamental that the courts will judge jurisdiction by the complaint of the party who brings the suit, "on how he casts his action", and not on the answer or claims of the defendant. *Pan American Petroleum Corporation* v. *Delaware*, 366 U.S. 656, 662 (1961). Under this rule, in the light of the complaint before the District Court and this Court, the claims of the appellees that this is a suit to enforce a republican form of government in Tennessee and to declare invalid the government of Tennessee and all of its laws since 1901, are irrelevant and of no value in reaching a determination that on the complaint made the federal courts have jurisdiction over the subject matter

set forth and jurisdiction to grant the relief actually requested by appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 6

CHARLES W. BAKER, ET AL., APPELLANTS

v.

JOE C. CARR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REARGUMENT[1]

OPINIONS BELOW

The opinion of Judge Miller of the District Court for the Middle District of Tennessee on convening a three-judge district court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge district court (R. 214) is reported at 179 F. Supp. 824.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on February 4, 1960 (R. 220–221). Notice of appeal to this Court was filed on March 29, 1960 (R. 310). Probable jurisdiction was noted on November 21, 1960 (R. 314). The jurisdiction of this Court rests on 28 U.S.C. 1253.

[1] This brief replaces the original brief on the merits filed by the United States.

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to consider claims of denial of equal protection under the Fourteenth Amendment, with respect to the right to vote, resulting from malapportionment of State legislatures.

2. Whether rights under the Fourteenth Amendment are violated by gross and unreasonable malapportionment of State legislatures.

3. Whether, in the circumstances of this case, the district court should be permitted to exercise its equitable discretion to consider the merits of appellants' claims.

STATEMENT

This action was brought on May 18, 1959, in the District Court for the Middle District of Tennessee by certain of the appellants (hereinafter referred to as the "original plaintiffs"), citizens of and qualified voters in the State of Tennessee (R. 3), on their own behalf, on behalf of all qualified voters in their respective counties (R. 6), and on behalf of all Tennessee voters who were similarly situated (R. 6). The action was brought against appellees, the Tennessee Secretary of State, the Attorney General of Tennessee, the Tennessee Co-Ordinator of Elections, and the Members of the Tennessee State Board of Elections in their representative capacities (R. 4–5). The complaint asserted rights under 42 U.S.C. 1983[1] (R. 1–2), which provides for suits in equity or other proper proceedings to redress deprivations of federal

[1] This provision originated as Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.

constitutional rights under color of State authority, and claimed that the district court had jurisdiction under 28 U.S.C. 1343(3)[3] (R. 2).

The complaint alleged that the Constitution of Tennessee (Article II, Sections 4, 5, and 6) provides for a maximum of 99 members of the House of Representatives and 33 members of the Senate and directs the General Assembly[4] to allocate, at least every ten years, the Senators and Representatives among the several counties or districts "according to the number of qualified voters in each" (R. 7–8). The complaint further alleged that, despite these mandatory requirements, no reapportionment had been made by the legislature since the Act of 1901[5] (R. 10); that, although many demands had been made upon the legislature to reapportion in accordance with the command of the State constitution (R. 14), and although many bills had been introduced in the legislature to accomplish this purpose (R. 15; R. 32–38; see also Ex. 2 to Intervening Complaint, R. 126–160), the appor-

[3] That section grants federal district courts jurisdiction over civil actions commenced to redress any deprivations, under color of state authority, of federal constitutional or statutory rights. The plaintiffs also asserted rights under 42 U.S.C. 1988 (R. 1–2), which provides that state law may be applied by federal district courts in cases involving civil rights (including cases arising under 42 U.S.C. 1983) if federal law is inadequate to provide a remedy.

[4] The General Assembly is the official name of the legislature of the State of Tennessee. Tenn. Const., Art. II.

[5] Tenn. Code Ann., Sections 3–101, to 3–109. The complaint was later amended to include the allegation that the Act of 1901 was in violation of the State constitution when drawn because it was passed without the enumeration of voters required by the State constitution (R. 86–87).

tionment of seats in the legislature remained as fixed by the Act of 1901 (R. 9-10). Another allegation was that, during the period intervening between the Act of 1901 and the year 1950, the population of the State of Tennessee grew from 2,021,000 to 3,292,000, but the growth had been very uneven between counties (R. 10). As a result, it was alleged, the counties in which the original plaintiffs resided were entitled to additional representatives (R. 11-12, 21; Ex. B, R. 22), but were denied this right because the distribution of legislative seats was not in accordance with the number of voters in each of the counties and districts (R. 12; Ex. C, R. 24; Ex. D, R. 26). It was alleged that, under the existing apportionment, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R. 28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F, R. 30).

The complaint asserted that, when all the inequalities in Tennessee electoral districts were taken together, the result was to prevent the Tennessee General Assembly, as presently composed, "from being a body representative of the people of the State of Tennessee" (R. 13), and that a minority ruled in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the Tennessee Constitution, and "to the philosophy of government in the United States and all Anglo-Saxon jurisprudence in which the legislature has the power to make law only

because it has the power and duty to represent the people"[6] (R. 13). As a result of the inequality of representation, it was alleged, there had been continuous and systematic discrimination by the legislature against the original plaintiffs and others similarly situated with respect to the allocation of the burdens and benefits of taxation (R. 16-18). The complaint concluded that the original plaintiffs, "and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment," in violation of their right to the equal protection of the laws required by the Tennessee Constitution,[7] and that, "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * *", they were denied the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 12, 19).

The complaint requested that a district court of three judges be convened pursuant to 28 U.S.C. 2281, and that the three-judge court (1) declare unconstitutional, as violative of the equal protection and due process clauses of the Fourteenth Amendment, "the present legislative apportionment of the State of Tennessee"; (2) declare the reapportionment Act of 1901 and the implementing provisions of the Tennessee Code violative of the State constitution and the Fourteenth Amendment; (3) restrain the appellees from

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[6] Tenn. Const., Art. I, Section 1, states that "all power is inherent in the people."

[7] Tenn. Const., Art. I, Section 5; Art. II, Sections 4-6; Art. XI, Sections 8, 16.

holding elections for members of the Tennessee legislature under the districts as established by the 1901 Act until such time as the legislature reapportioned the districts in accordance with the Tennessee Constitution; and (4) direct the appellees to hold the next elections for members of the Tennessee legislature on an at-large basis, with the thirty-three candidates for the State Senate receiving the highest number of votes declared elected to the State Senate, and the ninety-nine candidates for the House of Representatives receiving the highest number of votes elected to the House (R. 19–20).

On June 8 and 12, 1959, the appellees filed motions to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties (R. 46–47). On June 17, 1959, appellees filed a motion to dismiss the action without assembling a three-judge court, upon the ground that no substantial federal question was raised (R. 48). This motion was denied on July 31, 1959, by Judge Miller of the district court (R. 94). Judge Miller's opinion stated that he was "not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration" (R. 90), or that the decision in *Colegrove* v. *Green*, 328 U.S. 549, necessarily "close[d] the door to relief in the present case"[4] (R. 90). Judge Miller said further that there

[4] In *Colegrove*, the Court sustained the dismissal of an action by qualified voters to restrain the holding of congressional elections in Illinois under the provisions of an Illinois law deter-

were "differences between [*Colegrove*] and the present [case] that may ultimately prove to be "significant" (R. 91), and observed that "[t]he situation is such that if there is no judicial remedy there would appear to be no * * * remedy at all" (R. 91). Since in cases involving legislative reapportionment "[i]t can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention," Judge Miller stated that "a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen" (R. 93–94). Accordingly, pursuant to 28 U.S.C. 2284, he sent notice of the pendency of the action to the Chief Judge of the Court of Appeals of the Sixth Circuit (R. 94), and on August 10, 1959, a three-judge court was convened (R. 94–95).

On February 4, 1960, after other appellants, including Mayor Ben West of the City of Nashville, Tennessee,* and the City of Chattanooga, Tennessee,

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mining congressional districts. Judge Miller referred to the fact that, in *Colegrove*, the Illinois legislature, in failing to redistrict, had not violated any specific provision of its own constitution, and that there was ample power in Congress to redistrict the state if existing districts had become inequitable.

* West's intervening complaint asserted that the district court had jurisdiction under 28 U.S.C. 1343(4) as well as 28 U.S.C. 1343(3) (R. 103).

had been allowed to intervene as plaintiffs (R. 97, 99), and had filed complaints in intervention (R. 98, 100), the three-judge court entered an order dismissing the complaint on the grounds that the court lacked jurisdiction of the subject matter and the complaint failed to state a claim upon which relief could be granted (R. 220). Prior to entering this order, the court rendered an opinion asserting that "the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216). For this reason, the court declared that it had "no right to intervene or to grant the relief prayed for" (R. 220).

The case came to this Court on direct appeal and this Court noted probable jurisdiction (364 U.S. 898). After briefing and oral argument the Court set the case for reargument on October 9, 1961 (366 U.S. 907).

SUMMARY OF ARGUMENT

Appellants claim that their rights under the Fourteenth Amendment are denied by the arbitrary and unreasonable apportionment of their State legislature. They assert that they, as a geographical class, have been the victims of a gross discrimination which has gravely diluted the value of their franchise. The court below dismissed the complaint on the ground that the case involves a political question and that therefore it was without jurisdiction, citing *Colegrove* v. *Green*, 328 U.S. 549.

The view that legislative malapportionment raises exclusively political questions seems to rest upon (1) doubt as to whether the fair allocation of legislative seats is sufficiently amenable to rational analysis to be suitable for judicial review and (2) doubts concerning the effectiveness of judicial remedies. We submit that, although there is wide scope for the play of political considerations in the area of legislative apportionment, the interests deserving constitutional recognition are sufficiently identifiable to permit the rational analysis requisite for constitutional adjudication. We further submit that the remedies available to federal courts are sufficient to preclude a hard-and-fast rule denying jurisdiction. We believe that the legislative apportionment in Tennessee is so grossly discriminatory as to violate the Fourteenth Amendment and that judicial relief is available against this violation. Neither question, however, requires a final decision at this stage, for the dismissal—for want of jurisdiction and not for failure to state a substantive cause of action—can be affirmed only if some rigid doctrine deprives the federal courts of jurisdiction to redress any malapportionment, however gross and however susceptible to a judicial remedy it may be. It is sufficient for the federal courts to assume jurisdiction that the complaint state a colorable claim under the Fourteenth Amendment and that a judicial remedy appears merely possible. If it is later shown that no judicial remedy can in fact be fashioned, the court can exercise its equitable discretion to dismiss.

I

The complaint in this case sufficiently alleges a violation of complainants' rights under the Fourteenth Amendment to be within the jurisdiction of the district court.

A. The Fourteenth Amendment is violated by an arbitrary and unreasonable apportionment of seats in a State legislature.

1. This Court has repeatedly invalidated discriminations against a class of voters based on race. The prohibitions of the Fourteenth Amendment are not confined to discriminations based on race, but extend to arbitrary and capricious action against other groups. Thus, a geographical classification may be so irrational as to violate the Fourteenth Amendment.

Although a wide discretion is left to the States, State legislation with respect to legislative apportionment nevertheless must conform to the Fourteenth Amendment. It must be "rooted in reason" *Griffin* v. *Illinois*, 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring), i.e., it must not create classifications so arbitrary as to violate the equal protection clause. Similarly, the due process clause prohibits malapportionment so gross as to deprive persons of a fair share in choosing their own government, for this would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Palko* v. *Connecticut*, 302 U.S. 319, 325).

2. The merits of a challenge to the constitutionality of a legislative apportionment under the Fourteenth Amendment are amenable to reasoned analysis and

judicial determination. While the Amendment's guarantees do not lend themselves to mathematical formulas, the starting point must be *per capita* equality of representation, a fundamental American ideal. Since, however, political power is not a function of numbers alone, other desiderata may also be recognized, such as political subdivisions and geographic areas.

Where a malapportionment is challenged under the equal protection or due process clause, the initial step is to inquire whether it has any asserted justification or any coherent purpose beyond the perpetuation of past political power. If none can be asserted and the discrimination is gross, the apportionment violates the Fourteenth Amendment. If a justification were asserted, further inquiry would be required in order to determine whether this justification resulted in a reasonable classification and violated no "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." This process of adjudicating the constitutionality of a State legislative apportionment does not call for the exercise of a different function or require the Court to proceed in a different manner than in the resolution of other due process and equal protection issues.

3. The need for constitutional protection is urgent, because malapportionment is subverting responsible State and local government. Malapportionment in State legislatures is markedly more severe than Congressional malapportionment, and is becoming increasingly worse. It has had the widespread

consequence of disabling the States from meeting burgeoning urban needs.

B. Tennessee's legislative apportionment, as described in the complaint, violates the equal protection and due process clauses of the Fourteenth Amendment. The complaint alleges that a minority of 37 percent of the voting population controls twenty of the thirty-three members of the Senate, and a minority of 40 percent of the voting population controls sixty-three of the ninety-nine members of the House of Representatives. No justification for so gross a departure from the basic ideal of political equality has even been suggested by the appellees. Thus, this case is hardly distinguishable from *Gomillion* v. *Lightfoot*, 364 U.S. 339, where this Court struck down a State attempt to draw the boundary lines of a political subdivision because the State showed no rational justification to rebut the plaintiffs' claim of racial discrimination.

C. It is unnecessary, however, to determine whether the complaint states a cause of action in order to hold that the district court had jurisdiction. "[I]f the bill * * * makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 273. The only exceptions to this doctrine are where the federal claim is patently frivolous or made solely to obtain federal jurisdiction. Whatever its ultimate merit, the complaint here is squarely founded on the Fourteenth Amendment and presents a substantial claim.

II

The district court had, and should have exercised, jurisdiction over this action to redress an unconstitutional apportionment. General jurisdiction is clearly conferred by 28 U.S.C. 1343 which gives the district courts jurisdiction of any civil action to secure redress for a violation of constitutional rights under color of State authority. Appellants have standing to bring this action for they seek to vindicate personal rights. This Court has recognized that voters have standing to assert either that they have been denied the right to vote entirely or that they must vote pursuant to an invalid State apportionment of Congressional Representatives.

A. The constitutional issue is not a political question beyond the jurisdiction of the federal courts.

1. The Court has never held that apportionment cases necessarily raise non-justiciable questions. Rather, it has passed on the merits of apportionment systems. *E.g., Smiley* v. *Holm*, 285 U.S. 355. *Colegrove* v. *Green, supra,* does not hold to the contrary. Admittedly, three Justices would have held there that apportionment of Representatives is a political question beyond the power of federal courts to decide, but a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that the federal courts do have such power. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that, under *Smiley* v. *Holm* (328 U.S. at 565) "this Court has power to afford relief in a case of this type * * *."

In no subsequent apportionment case does this Court appear to have held that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *South* v. *Peters*, 339 U.S. 276, the Court stated that the "[f]ederal courts consistently refuse to exercise their equity powers * * *"—not that no power exists. In a series of later cases, the Court has refused to entertain the issue of malapportionment on the merits without indicating the basis of its decision. And, just last term, in *Gomillion* v. *Lightfoot*, *supra*, the Court held that the power of a State to fix boundaries of its political subdivisions cannot be exercised in such a way as to deprive a person of his right to vote because of race.

2. In any event *Colegrove* v. *Green* is distinguishable from the present case, both because of important distinctions and because its rationale has been undermined by subsequent developments.

Colegrove dealt with apportionment of Congressional districts. The opinion of Mr. Justice Frankfurter states that the power of Congress to consider Congressional apportionment is exclusive, relying on the power of the House of Representatives to judge the qualifications of its own members under Article I, Section 5, and of Congress to regulate the holding of elections under Article I, Section 4. Article I, Sections 4 and 5, are obviously not relevant here. Congressional power to enact "appropriate legislation" under the Fourteenth Amendment is not comparable since this Court has always dealt with any violation of the Fourteenth Amendment without awaiting im-

plementing legislation beyond the general statute conferring jurisdiction.

The Civil Rights Acts of 1957 and 1960, both enacted subsequent to *Colegrove*, also show that the election process is not to be regarded as exclusively political in nature. In both Acts Congress emphasized the national policy of relying on the judiciary as the organ through which the right to vote is to be made fully effective.

Another important factor on which reliance was placed in the opinion of Mr. Justice Frankfurter in the *Colegrove* case was the difficulty of finding an effective and appropriate remedy. But, as we will see, there is every reason to believe that appropriate judicial remedies can be applied in the present case.

3. *Luther* v. *Borden*, 7 How. 1, and similar cases are distinguishable because here the complainants do not challenge the legitimacy of any previously chosen legislature or the validity of any of its enactments. Nor is there even any need to decide upon the legitimacy of the present legislature. Although the Supreme Court of Tennessee expressed the fear that sustaining a legal challenge to the existing apportionment act would leave Tennessee without a legislature to enact a new apportionment act (*Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the Court in this case need simply hold that future elections under the existing apportionment act would be invalid. This Court, moreover, is not

bound by State court decisions concerning the legal consequences of a federal decree.

III

The exercise of sound equitable discretion requires the federal courts to retain jurisdiction and adjudicate the merits of the present controversy. There are compelling circumstances to invoke the chancellor's conscience.

1. The merits of this case can be adjudicated without intruding into the legislative or political process. There is no need here to consider whether there is any rational and constitutional justification for Tennessee's grossly unequal apportionment. For Tennessee has offered no basis for making its apportionment other than the equal representation required by its constitution; and the present apportionment is grossly unequal. In these circumstances, the constitutional question is no harder for a court to answer than other constitutional questions which the courts have been adjudicating for decades.

2. The seriousness of the wrong calls for judicial action. It is only a slight exaggeration to say that one-third of the voters of Tennessee rule the other two-thirds in the enactment of legislation.

3. The complainants have no judicial remedy outside of the federal courts because they have exhausted their remedies in the State courts. They have no political remedies in Tennessee, moreover, as shown by the history of inaction, the improbability that the Tennessee legislators will vote to surrender their power, and the fact that only the legislature can call a constitutional convention.

4. Effective judicial relief can be provided here without overstepping the limits of appropriate judicial action. The Tennessee constitution provides guidelines for proper apportionment. In order to achieve a more equitable apportionment, only a few changes, which are clearly indicated by the rules laid down by the Tennessee constitution, need be made in each house. Alternatively, the court could order an election at large or one of several other remedies. But it is unlikely that it would even be necessary for the court to order any relief. Recent cases show that State legislatures often reapportion themselves when faced with the likelihood of judicial action. Since there are excellent political reasons for a legislature to prefer reapportioning itself, a judicial determination that the existing apportionment is unconstitutional, reserving action as to the proper remedy, is very likely to result in prompt legislative action.

ARGUMENT

This case involves the most basic right in a democracy, the right to fair representation in one's own government. According to the complaint—and at this stage of the case the allegations of the complaint must be accepted as true—the Tennessee legislature has not been reapportioned since 1901, contrary to the explicit terms of the State constitution, which requires reapportionment every ten years. The result is gross discrimination against voters in several parts of the State. A single vote in Moore County is worth nineteen votes in Hamilton County in electing members of the State House of Representatives. A vote in

Stewart or Chester County has almost eight times the weight of a vote in Shelby or Knox County. Thirty-seven percent of the voting population elects sixty percent of the State Senate—twenty of thirty-three members. Forty percent of the voters elects sixty-three percent of the House of Representatives—sixty-three of ninety-nine members.

This discrimination, principally against urban voters, has at least two consequences. *First*, these voters are deprived of the fundamental right to share fairly in choosing their own government. *Second*, the extreme underrepresentation of urban voters has resulted in discrimination by the State legislature against urban areas in the State's exercise of its governmental powers. In Tennessee, as in many other States, the underrepresentation of urban voters has been a dominant factor in the refusal of the State to meet the growing problems of the cities.

The court below, although it agreed that there was "a clear violation * * * of the rights of the plaintiffs" (R. 219), dismissed the bill upon the ground that "federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216), citing *Colegrove* v. *Green*, 328 U.S. 549, and later cases. The central issue upon this appeal, therefore, is whether the claim that a legislative malapportionment is so gross as to violate the due process or equal protection clause of the Fourteenth Amendment presents a justiciable question. We submit that the complainants' claim is justiciable; that *Colegrove* v. *Green*

does not support the dismissal for want of jurisdiction; and that the court below should retain jurisdiction and adjudicate the merits.

The view that legislative malapportionment raises exclusively political questions appears to rest, at bottom, upon (1) doubt as to whether the fair allocation of legislative seats is sufficiently amenable to rational analysis to be suitable for judicial review and (2) misgivings concerning the effectiveness of judicial remedies. We propose to demonstrate that, although there are wide areas for compromise and all kinds of political considerations may enter into legislative apportionment, the interests deserving constitutional recognition are sufficiently identifiable and the relevant factors are sufficiently articulatable to permit the kind of rational analysis requisite for constitutional adjudication. We also submit that, although jurisdiction must sometimes be declined in the exercise of equitable discretion, the courts have sufficient ability to provide effective relief, without intruding into the sphere of political judgments, to preclude laying down any hard and fast exclusionary rule based upon the supposed inappropriateness of judicial remedies.

These two questions, which we believe determine the justiciability of a constitutional attack upon a legislative malapportionment, parallel the two basic issues which must ultimately be decided in the present litigation, *viz.*—

1. Whether the malapportionment of the Tennessee legislature violates rights of the

complainants secured by the Fourteenth Amendment.

2. Whether judicial relief is available against the alleged violation.

Although both questions are present, neither requires a final decision at this stage of the case. The district court's opinion indicates that it dismissed the bill for want of jurisdiction without any real consideration of whether it substantively stated a cause of action (R. 220). The decree can be affirmed only if some rigid doctrine deprives the federal courts of jurisdiction to redress a malapportionment, however gross and however susceptible to a judicial remedy it may be.

It is permissible but not necessary to decide whether the malapportionment alleged in the complaint violates the Fourteenth Amendment. The court below did not rule upon the point. We submit that the complaint states a cause of action. If this Court has doubt but agrees that the claim is justiciable, it would be proper to reverse and remand for consideration of the merits by the three-judge court. Certainly the complainant states a colorable claim under the Fourteenth Amendment, and it is well settled that "[i]f the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not"—at least when not patently frivolous. *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 273–274.

Similarly, it is not necessary to decide now on a particular remedy for Tennessee's malapportionment. If, as we contend, the federal courts have power to hear such cases, subject to the exercise of their equi-

table discretion to dismiss if it should appear that an appropriate decree could not be fashioned, then the decision below must be reversed; for in the present case there is every likelihood that the lower court can give appropriate relief. Whether the probability can be realized, should be left to the future.

In the argument which follows we present first the contention that the malapportionment of the Tennessee legislature violates the equal protection and due process clauses of the Fourteenth Amendment. Our primary purpose is to show in the context of an actual controversy that both the substance of such constitutional claims and also the available criteria for decision are of such a character as to render the claims amenable to judicial consideration. In the second part of this brief we deal with other alleged obstacles to the exercise of jurisdiction, with special emphasis upon the availability and effectiveness of judicial remedies. Thus, both branches of the argument, despite their other aspects, center upon the justiciability of a claim that a legislative malapportionment is so gross as to violate the Fourteenth Amendment.

I

THE COMPLAINT SUFFICIENTLY ALLEGES A VIOLATION OF COMPLAINANTS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO BE WITHIN THE JURISDICTION OF THE DISTRICT COURT

A. THE FOURTEENTH AMENDMENT IS VIOLATED BY AN ARBITRARY AND UNREASONABLE APPORTIONMENT OF SEATS IN A STATE LEGISLATURE

1. *The right to be free from gross discrimination in the selection of a State legislature is a federal right protected by the Fourteenth Amendment.*

Appellants allege in their complaint that "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * * [they] and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment * * *" (R. 12; see also R. 10, 19). They assert that the State legislature, despite an explicit command in the State constitution, has failed to reapportion State legislative districts since 1901 (R. 9-10, 86). As a result, they allege, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate * * *" and 40 percent of the voters elects sixty-three of the ninety-nine members of the House (R. 13). They claim that they thereby "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment * * *" (R. 12). The complaint and the supporting papers thus assert a claim of discrimination against Tennessee voters based on their geographic location.

The right to be free from hostile or capricious discrimination by a State in defining the class of persons entitled to vote, as well as in the exercise of the franchise, is a federal right protected by the Fourteenth Amendment. The Court has repeatedly invalidated discriminations against a class of voters on the basis of race. *E.g., Nixon* v. *Herndon*, 273 U.S. 536; cf. *Smith* v. *Allwright*, 321 U.S. 649; *Gomillion* v. *Lightfoot*, 364 U.S. 339. And, ever since *Munn* v. *Illinois*, 94 U.S. 113, it has been clear that prohibitions in the

Fourteenth Amendment are not confined to discrimination based on color, but extend to arbitrary and capricious action against other groups. Thus, it would obviously violate the due process and equal protection clauses for a State to deny the franchise to persons who had ever visited the Soviet Union or to women who bobbed their hair.[10]

A geographical classification may also be so irrational as to violate the Fourteenth Amendment. No one would defend the constitutionality of giving one twenty-fifth of a vote to citizens in the eastern half of a State and one vote to those in the western half. The case is exactly the same when a statute gives one representative to each of the populous counties in the eastern half and twenty-five representatives to the sparsely populated counties in the west. The statute which arbitrarily provides such disproportionate representation must therefore be equally unconstitutional. There is no merit to appellees' distinction be-

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[10] In this context it seems unnecessary to distinguish between the due process and equal protection clauses. The liberty protected by the due process clause, of course, includes the right to vote. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, this Court held that gross discrimination constitutes a denial of due process:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Thus, it appears that malapportionment can so grossly discriminate against urban voters that it violates due process.

tween the denial of voting rights and the distortion of their weight in the legislative chambers. In *United States* v. *Classic*, 313 U.S. 299, the Court held that a qualified voter had a constitutional right to have his vote counted in a primary election for the House of Representatives without dilution by fraudulent tabulations. Similarly, in *United States* v. *Saylor*, 322 U.S. 385, the Court ruled that a qualified voter had a constitutional right to have his vote counted in the election of a Senator without dilution by the stuffing of ballot boxes. In both these cases the essence of the wrong was the improper devaluation of votes.

Of course, a wide range of discretion is left to the States in choosing units of representation. So long as the State legislature fairly represents the people of the State, there can be no violation of the Constitution. It does not follow, however, that merely because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. State legislation dealing with legislative apportionment must be measured by tests of reasonableness like other State legislation. Such legislation must be "rooted in reason" (*Griffin* v. *Illinois*, 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring)), *i.e.*, it must not create classifications so arbitrary and unreasonable as to offend the equal protection clause of the Fourteenth Amendment. The due process clause protects rights "found to be implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U.S. 319, 325); which are "of the very essence of a scheme of ordered liberty" (*ibid.*); which, if abol-

ished, would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" *Snyder* v. *Massachusetts*, 291 U.S. 97, 105) (302 U.S. at 325); and which "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (*Hebert* v. *Louisiana*, 272 U.S. 312, 316 (302 U.S. at 328). Certainly, the right to have a fair share in the choosing of one's own government is "of the very essence of a scheme of ordered liberty" and is a fundamental principle of liberty and justice lying "at the base of all our civil and political institutions." When a State arbitrarily and unreasonably apportions its legislature so as to deny the real meaning of the right to vote, *i.e.*, effective participation in democratic government, both the equal protection and due process clauses are violated.

2. *The merits of a challenge to the constitutionality of a legislative apportionment under the Fourteenth Amendment are amenable to reasoned analysis and judicial determination.*

It is unnecessary and unwise to attempt to formulate precise tests for determining when a legislative apportionment violates the Fourteenth Amendment. The Amendment's fundamental guarantees do not lend themselves to mathematical formulas. The line must be pricked out case by case. It may be useful, however, since the basic issue is *res nova*, to suggest some of the factors which would ultimately have to be weighed in deciding whether an apportionment act violates the equal protection or due process clause of the Fourteenth Amendment. Their analysis shows

that legislative apportionment, although it involves many compromises, is properly rooted in reason; that judicial review of the merits of a questioned apportionment is not dissimilar to review of other classifications; and that the challenge to a particular apportionment is therefore susceptible to constitutional adjudication.

(a) *Numerical Equality.*—Surely the starting point must be *per capita* equality of representation. Political equality is one of the fundamental ideals of American life. Any serious departure from apportionment according to population (whether persons or qualified voters)—certainly any departure affecting both houses of the legislature—is subject to question, although the divergence might also be shown to have a rational justification. Since exact numerical equality of population within legislative districts is impossible to achieve, all that the principle requires, in this context, is "that equality in the representation of the state which an ordinary knowledge of the population and a sense of common justice would suggest" (*Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869).[11]

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[11] Among yardsticks proposed for measuring permissible variations have been evaluation of the relative deviation above or below the average population of all districts in the State, and the relative excess of the largest over the smallest districts in the State. See Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L.J. 127, 138, note 45 (1946); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L. Rev. 277, 293, note 78 (1956); Celler, *Congressional Apportionment—Past, Present, and Future*, 17 Law & Contemp. Prob. 268, 274–275 (1952).

The following chart lists comparative population figures in certain cases where legislative reapportionment acts have been

The extent to which the right of equal representation is ingrained in our constitutional system is evidenced by the fact that more than four-fifths of the State constitutions make apportionment according to population or qualified voters the basic principle for choosing at least one branch of the State legislature. Thus, thirteen States provide for apportionment in both houses based largely on population (meaning either people or voters).[13] Another twelve States apportion in this manner, except that in one house each county or town is guaranteed at least one seat.[14] Nineteen States, although they provide other bases for choosing the representatives in one branch, call for apportionment of the other according to population either with or without the stipulation that each county or town shall have at least one seat.[15]

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invalidated by State courts. Of course, the test under any particular State constitution may not be the same as under the Fourteenth Amendment.

	Largest district	Smallest district
Ragland v. *Anderson*, 125 Ky. 141, 100 S. W. 865 (1907)	82, 253	7, 407
Stiglitz v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931)	128, 805	39, 210
State v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892)	38, 801	6, 833
Baird v. *Board of Sup'rs*, 136 N.Y. 95, 32 N.E. 827 (1893)	102, 905	31, 885
Attorney General v. *Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 651 (1916)	6, 182	1, 947
Giddings v. *Blacker*, 93 Mich. 1, 52 N.W. 944 (1892)	91, 420	29, 727
Williams v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906)	116, 629	32, 731

[13] Colorado, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska (unicameral), Oklahoma, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin.

[14] Alabama, Iowa, Maine, Missouri, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Utah, Wyoming.

[15] Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, New Hampshire, New Jersey, North Dakota,

We are not unmindful of the warning that, "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government" (*MacDougall* v. *Green*, 335 U.S. 281, 283). Historical practice shows the existence of other desiderata (see pp. 28–31 below), the due recognition of which may call for some departure from apportionment according to population; and a State has wide discretion in evaluating the opposing interests and making an accommodation. Our argument on this point is simply that the other desiderata are capable of the kind of rational statement and analysis which is required for constitutional adjudication. If the State can point to neither rhyme nor reason for a discriminatory apportionment, save that it is an anachronism, the apportionment should be held to violate the Fourteenth Amendment.[15]

(b) *Criteria Justifying Some Inequality in Apportionment.*—Historically, the claim of political subdivisions to representation regardless of size has been an important reason for departing from the strict rule of apportionment according to population. Early in our history the town or county was often

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South Carolina, Vermont. In six States the State constitution or statute does not expressly base apportionment in at least one house on population. In Kansas, Mississippi, New Mexico, and Virginia there is no indication as to the method of apportionment. The Maryland and Delaware constitutions specifically prescribe the number of representatives for each district.

[15] This proposition seems sufficient for the present case since Tennessee offers no justification for its gross malapportionment. See pp. 45–47 below. In other situations it might be necessary to go on and determine whether the reasons given by the State are sufficient justification. See p. 33 below.

a dominant unit of government, and the colonial assembly and later the State legislature were composed of representatives from these entities. Since it was the town or county that was being represented, in a very real sense, and not the people directly, it was natural to guarantee each unit at least one representative in one, and sometimes both, of the branches of the legislature. Such provisions are still found in the constitutions of twenty-seven States.[16] In eight of these States enough weight has been attached to the county or town as a unit to provide that each such subdivision should have the same representation in one branch of the legislature.[17] The federal Constitution contains a similar compromise between the claims of the States and direct representation of the people.

The interest in geographical distribution of political power is also advanced by granting some representation to each town, county, or other political subdivision. Constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a

[16] Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont.

[17] Arizona, Connecticut, Idaho, Nevada, New Jersey, New Mexico, South Carolina, Vermont.

conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard.

Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by a strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas. It would probably be unconstitutional even under these circumstances, however, to apportion both houses of the legislature in such a way that both houses were controlled by representatives chosen by the rural thirty percent of the State's population.[18]

Other factors have also been considered in allocating legislators, such as the share of a district in the cost of State government. In New Hampshire seats in the Senate are apportioned in the ratio of direct taxes paid.

Some inequality can be justified, not only on the basis of the deliberate systems of apportionment discussed above, but also as the result of population

[18] This problem seems to have been taken into account in the Texas Constitution. Seats in the lower house are apportioned according to population but no county may have more than seven representatives unless its population exceeds 700,000, in which event it is allocated one representative for each additional 100,000 people. Evidently, the purpose was to prevent one or two heavily populated counties from dominating the State.

shifts since the last apportionment. The expense, unsettling effects, and legislative time required make it impracticable for legislatures to reapportion at every session. In determining what is an excessive hiatus between apportionments, the historic requirements for reapportionment contained in State constitutions all over the country again show the considered judgment of the community. The constitutions of forty-three States require the apportionment or redistricting of one or both houses of the legislature at least once every ten years. None suggests a 40, 50, or 60-year interval.

(c) *Other Considerations in Determining Constitutionality.*—When a legislature is unequally apportioned, there are at least two other facts to be considered in determining whether the inequality is gross enough to violate the Fourteenth Amendment. First, gross malapportionment in a unicameral legislature or in both houses of a bicameral legislature is obviously harder to justify than a system of representation which is based on population in one house, and, in the other, apportions representatives upon some other basis. This compromise between opposing desiderata is found in the constitutions of the United States and a number of States. Conversely, the most serious instances of malapportionment are those which permit minorities to rule both branches of the legislature.

Second, the availability of other methods of expressing the popular will is relevant in the event that the legislature is not apportioned in accordance with population. For example, complaints of under-

representation in a State legislature may be less serious in a State which provides for legislation by referenda initiated by a reasonable number of voters. Under such a system, the majority of the population can pass legislation and, indeed, can reapportion the legislature itself. On the other hand, such a remedy would hardly be sufficient if a minority of the people were seriously underrepresented. The availability of a constitutional correction is also material. If a convention could be called by petition or some other expression of popular will, the availability of this remedy would perhaps offset a measure of inequality in the apportionment. On the other hand, the unfairness is the greater if only the malapportioned legislature can call a constitutional convention, as in Tennessee. Tenn. Const., Art. XI, Section 3.

The foregoing illustrations, taken from State constitutions, do not exhaust the list of factors which might be taken into account in apportioning a State legislature or in judging the constitutionality of a particular apportionment under the Fourteenth Amendment. A study of State constitutions does show, however, that the acceptable bases for any serious departure from the basic ideal of political equality are amenable to identification and articulation. Consequently, where a serious malapportionment is challenged under the due process or equal protection clause, the initial step is to inquire whether it has any asserted justification or coherent purpose beyond the perpetuation of past political power. This was the process suggesetd by the Court in *Gomillion* v. *Light-*

foot, 364 U.S. 339, 342, where an analogous question of State districting was involved (see pp. 47–48 below). If no justification can even be asserted, as in this case, and the discriminations and inequities are gross, the apportionment violates the Fourteenth Amendment.

In a case in which a comprehensible justification for the departure from the principle of equal representation was asserted, the Court would have to go farther and determine whether this justification was sufficient, i.e., resulted in a reasonable classification and violated no "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." This issue necessarily turns on matters of judgment and degree. The apportionment of representatives in the ratio of the value of real property, for example, may be offered as a justification, but there is ground to inquire whether it is any longer consistent with those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U.S. 312, 316. Similarly, the desire to give historic subdivisions a minimum of one representative per unit in one house may be a sufficient justification for a small departure from the rule of equal representation in proportion to the population to satisfy the requirements of the Fourteenth Amendment; but the larger the departure became, the less adequate the justification would be.[29]

[29] This issue should be resolved in the light of current conditions and not merely by reference to historical practice. At the time most State constitutions were adopted the population was more evenly distributed than today, so that guaranteeing

Judgments upon the relative value of divergent interests, the art of compromise and accommodation, and the practicalities of political manipulation are the responsibility of the political branches of government. The constitutional limitations implicit in the due process and equal protection clauses leave a wide area for legislative discretion. Cf. *MacDougall* v. *Green*, 335 U.S. 281, 284. But free recognition of the breadth and importance of this aspect of a State's political power does not require exaltation of the power into an absolute. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342. The Court can and should afford citizens important protection of the right to vote under the Fourteenth Amendment by invalidating those discriminations which are so arbitrary and capricious as to lack any rational foundation. The process of adjudicating the constitutionality of a State legislative apportionment does not call for the exercise of a different function or require the Court to proceed in a different manner than in the resolution of many other issues of due process and equal protection.

Moreover, the need for constitutional protection here is infinitely greater. Arbitrary and capricious action affecting the fundamental right to vote goes to the

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each county or town a seat did not work the same discrimination against urban voters that it may cause today in a legislature with a limitation upon the number of members. Furthermore, towns and counties no longer have their historic separateness. Their importance has diminished, and even though history and common acceptance also have their claims, the methods of representation which once were fair and reasonable may now have less to commend them.

heart of our government. In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.

Arbitrary regulation of the right to vote, even more than restrictions upon freedom of communication, destroys the essential pre-conditions of alert democracy. Those who are denied the right to vote or who are grossly under-represented cannot protect their franchise by voting. There is, therefore, a special reason for the courts to exert all the power they possess for the vindication of these constitutional rights.

3. The need for constitutional protection is urgent because malapportionment of State legislatures is subverting responsible State and local government.

The dangers of arbitrary and capricious malapportionment defeating the fundamental right to vote are not merely theoretical. The disparities between State legislative districts, through selfishness or indifference, are constantly increasing, almost always to the disadvantage of growing cities. The consequences cast doubt upon the workability of State government and threaten to affect the balance of the federal system. The current conditions infecting legislative apportionment in some of our States are much more serious than the malapportionment of Congressional districts in 1946 at the time of the decision in *Colegrove* v. *Green*, 328 U.S. 549.

In 1946 the disparity between the most and least populous Congressional districts in Illinois was approximately eight to one. Illinois had then, by far, the most badly apportioned Congressional districts of any State in the country. Only one other State had a more than four to one disparity (Ohio), another State had a more than three to one disparity in Con-Dakota), and eleven other states had more than two to one disparities. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra*, 328 U.S. at 557–559. Similarly, in 1950, only one State had a more than three to one disparity in Congressional districts (South Dakota), and nine others had a more than two to one disparity. In Tennessee both in 1946 and 1950, the rate was slightly less than two to one.

In contrast, the situation in most State legislatures

is considerably worse. Figures derived from the 1950 federal census show that in Kansas, Delaware, Florida, Vermont, and Connecticut, majorities in the lower chamber of the State legislature represented only 22½ percent, 19½ percent, 17 percent, 12½ percent, and 9½ percent of the population, respectively. 106 Cong. Rec. 13828 (daily ed.). In Tennessee, according to the complaint, only 40 percent of the voters elect 63 of the 99 members of the lower house and 37 percent of the voters elect 20 of the 33 members of the upper house (R. 13). The smallest population per representative is 3,948, the largest 75,134, a ratio of 19 to 1.[20]

It is not accidental that the malapportionment of the State legislatures is considerably greater throughout the country (including Tennessee) than the malapportionment of Congressional districts, serious as the latter also is. For in most States periodic reapportionment of Congressional districts is virtually assured by law.[21] The result is that there was no ap-

[20] The record shows that the 2,340 qualified voters (as contrasted to total population) of Moore County are entitled to one representative in the Tennessee House of Representatives while the 312,345 voters of Shelby County elect only seven (R. 231, 234). This is a disparity of approximately 20 to 1.

[21] Every ten years the House is automatically reapportioned. The new apportionment is calculated by the executive department and transmitted to Congress. The report based on the 1960 census is Message from the President, H. Doc. No. 46, 87th Cong., 1st Sess. (January 12, 1961). Each State is then notified of the number of Representatives to which it is entitled. 46 Stat. 26 (1929), as amended, 2 U.S.C. 2(a). If the State loses one or more Representatives, it is required either to reapportion or to elect all its Representatives at large. The latter alternative has rarely been adopted, particularly by states with more than two Representatives. If the State gains one or more Representatives, it can either reapportion or elect the

preciable worsening of the malapportionment of Congress from 1928 to 1950 despite marked changes of population. In 1928, three States had a disparity between Congressional districts of more than three to one and nine others of over two to one. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. In 1946, one State had a disparity of over eight to one, another of over four to one, another over three to one, and eleven others of over two to one. *Ibid.* And in 1950 only one State had a disparity of over three to one, and but nine others had a disparity of over two to one.

The situation is becoming markedly worse, however, in the State legislatures. There has been no pressure, comparable to that which has led to the reapportionment of Representatives by Congress to force legislative action. The only major exception is where State courts have assumed jurisdiction (which has been frequent) and provided an effective remedy (which is less so). See Lewis, *Legislative Apportionment and the Federal Courts,* 71 Harv. L. Rev. 1057, 1066–1070. In States such as Tennessee in which the State courts have refused to act (see *Kidd* v. *McCan-*

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added Representatives at large. Again, the latter alternative has rarely been followed by the larger States. The 1960 census will result in nine states gaining and sixteen states losing one or more Representatives. In addition, five states will have only one Representative and two states elect at present their only two Representatives at large. See Message of the President, H. Doc. No. 46, 87th Cong., 1st Sess., pp. 1, 2; Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 81.

less, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the State legislatures have generally refused to obey the provisions in their own constitutions or statutes requiring regular reapportionment. Although the constitutions of forty-three States require reapportionment or redistricting [22] of one or both houses of the legislature every ten years (including Tennessee) or more frequently, in 1958 twenty-three of the then forty-eight States had not reapportioned for periods ranging from ten years to half a century or more. See Lewis, *op. cit. supra*, p. 1060; Alaska Const., Art. VI, Sections 3, 5–7; Hawaii Const., Art. III, Section 4. See also 106 Cong. Rec. 13831–13833 (daily ed.) for tabular analyses of the requirements of State constitutions. Alabama, Connecticut, Delaware, Maryland, New Jersey, South Carolina, and Vermont, in addition to Tennessee, had apportionments and legislative districts which were over fifty years old. At least twenty-seven legislatures had not been touched for more than twenty-five years. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.). The result has been in Tennessee, as elsewhere, that as population has shifted, particularly toward urban centers, State legislative malapportionment has become drastically worse.

In our country's early history, the average citizen looked to the State legislature for initiative and wisdom in the formulation of public policy on domestic

[22] Reapportionment requires only a reevaluation of the number of legislators allotted each district, while redistricting requires that the districts themselves be redrawn.

issues. U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 38. Only thirty years ago Mr. Justice Brandeis singled out as an important characteristic of our federal system the fact that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (dissenting opinion). The State legislatures, however, have in very large part failed to adapt themselves to modern problems and majority needs, and this failure has resulted in public cynicism, disillusionment, and loss of confidence. A primary reason for the failure of the States to respond is that in many States a majority of the people, even a large majority, do not control the legislature. The dictation of legislative action by a minority of the citizens has tended to stifle civic responsibility at the very time when novel problems are pressing upon the country.

More specifically, the most glaring consequence of malapportionment of State legislatures is the gross underrepresentation of urban interests. As cities have grown more rapidly than rural areas, the existing apportionments, when not changed by the legislatures, have tended to create an increasing imbalance in legislative representation discriminating against urban areas.[28] As early as 1928, H. L. Mencken, in his characteristically caustic manner, commented

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[28] See Baker, *Rural Versus Urban Political Power* (1955), pp. 16–17, note a, for a table showing the extent of urban underrepresentation in the state legislatures.

upon the inequities of this situation. "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans." Mencken, *A Carnival of Buncombe*, 160 (Moos ed., 1956) (reprinted from the Baltimore Evening Sun, July 23, 1928, p. 15, col. 4 (financial ed.). Then, in a rare note of optimism, he added: "But that can't last. It is not only unjust and undemocratic; it is absurd."[*] *Ibid.* One may dislike Mencken's prejudice against rural citizens, yet recognize the inequity. Mencken proved a better wit than a prophet, for the same complaint and prognosis were echoed thirty years later by President (then Senator) Kennedy (Kennedy, *The Shame of the States*, New York Times Magazine, May 18, 1958, pp. 12, 37):

> [T]he apportionment of representation in our legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled.

The malapportionment of State legislatures not only subverts democratic principles generally, but it also has the effect of precluding the States from meeting burgeoning needs resulting from the transformation of the basic character of our society from

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[*] It may not be entirely coincidental that the Tennessee House recently voted down a bill to repeal the "Monkey Law," which prohibits teaching about evolution. Washington Post, March 4, 1961, p. A3, col. 7.

predominantly rural to predominantly urban." See U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis*, written by the Editors of *Fortune* (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms, as the complaint here alleges, as systematically discriminatory taxation of underrepresented, generally urban, areas as contrasted with overrepresented rural areas; far greater per capita spending by the State in overrepresented rural areas than in the urban areas (R. 16–18; see also R. 229–254);[35] and the denial even of the urban areas' pro-

[35] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.)

[36] Nor is this situation limited to Tennessee. In Colorado, for example, the legislature allows Denver only $2.3 million a year in school aid for 90,000 children, but gives adjacent Jefferson County, a semi-rural area, $2.4 million for 18,000 pupils. Stront, *The Next Election Is Already Rigged*, Harper's (November 1959), reprinted at 106 Cong. Rec. 13840 (daily ed.). In Penn-

portionate share of matching funds provided by the federal government (R. 119–120). In addition, the State legislatures have frequently refused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the States' neglect of the reapportionment problem is that urban governments now tend to by-pass the States and enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and water pollution facilities. This multiplication of national-local relationships reinforces the debilitation of State governments by weakening the States' control over their own policies and their authority over their own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (The Kestnbaum Commission, whose members were appointed by the President) cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." After hearings on the Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, House Committee on Government Operations, 85th Cong., 2d Sess., p. 47.

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sylvania, the legislature pays $8 per day for the care of indigent patients to each non-sectarian hospital in the state—except Philadelphia's city-owned General Hospital, which must provide such services at an annual cost of $2.5 million. *Ibid.*

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Constitutional adjudication under the Fourteenth Amendment cannot correct all the problems of malapportionment. The States have broad discretion, and within that area the only remedy is an enlightened citizenry. But broad discretion is not the equivalent of absolute and arbitrary power. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342. The Fourteenth Amendment reaches at least those egregious cases in which geographical or other discrimination imposed by a minority lacks a rational foundation. And while the urgency of the need cannot confer jurisdiction upon the federal courts, it should carry a potent appeal for the exercise of existing jurisdiction.

B. THE TENNESSEE LEGISLATIVE APPORTIONMENT, AS DESCRIBED IN THE COMPLAINT, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Although Article II, Section 6, of the Tennessee constitution requires the legislature to allocate the ninety-nine seats in the House of Representatives and thirty-three seats in the Senate among the several counties or districts "according to the number of qualified voters in each," no apportionment has been made for sixty years. Between 1901 and 1950, according to the complaint, the population grew from 2,021,000 to 3,292,000. The 1960 federal census puts the population of Tennessee at 3,567,089. The growth was uneven between counties. The areas around Memphis, Nashville, Chattanooga, and Knoxville and Oak Ridge grew much faster than other parts of the State. Judged by the 1950 census, the complaint alleges, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R.

28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F., R. 30). In Moore County 2,340 qualified voters elect one representative to the lower house, while the 312,345 qualified voters of Shelby County elect only seven (R. 231, 234). The result, in substance, is that a citizen of Shelby County is allowed only one-nineteenth of a vote in relation to each Moore County voter. And the discrimination is gross all over the State.

It would seem too plain for argument that this arbitrary and capricious discrimination against the voters in growing counties violates the due process and equal protection clauses of the Fourteenth Amendment—unless the Court is to hold, contrary to our contention, that the Fourteenth Amendment places no restriction whatever upon the apportionment powers of a State. So gross a departure from the basic ideal of political equality, affecting both branches of the legislature, requires some rational justification. None has been suggested by the appellees; indeed, it is hard to see how any could be suggested because the Tennessee constitution requires the apportionment among districts to be made "according to the number of qualified voters in each." *Prima facie*, therefore, the complainants have made out their case.

In referring to the Tennessee constitution we do not suggest that petitioners have a federal right to have the Tennessee legislature apportioned according to the State constitution. The requirements of the Tennessee constitution are significant, coupled

with the passage of sixty years from the last apportionment, because they go far to show that there is no rational basis whatever for the present allocation of seats in the Tennessee legislature. The present allocation cannot be supported upon the only ground permissible under the State constitution. The constitution forbids the use of another method. The malapportionment results chiefly from the changes in the distribution of the population during the passage of sixty years. It is fair to infer, at least in the absence of any other explanation, that the continued use of the 1901 apportionment results from the indifference of the incumbents or their determination to retain unwarranted power, and not from any rational policy.

Nashville, C. & St. L. Ry. v. *Browning*, 310 U.S. 362, presented a different question. There the State authorities had classified the property of public utilities differently from all other property for purposes of taxation, and had taxed it at a higher rate in alleged violation of the State constitution. But the differentiation was made deliberately—"all the organs of the State are conforming to a practice, systematic, unbroken for more than forty years" (310 U.S. at 369)—and the classification, whether it violated the Tennessee constitution or not, had a widely understood, rational foundation. The *Browning* case might be applicable here if the present apportionment of the Tennessee legislature is later shown to be rooted in reason. The present record shows no justification. Even in argument, none has been suggested.

The Tennessee apportionment is not supported by any of the considerations which have sometimes led the framers of other State constitutions to compromise the principle of numerical equality among legislative districts. The present Tennessee apportionment cannot be supported in either branch of the legislature as a rational effort based on political subdivisions or geography or as an attempt to balance rural and city representation. Under an apportionment according to population the urban voters would not elect a majority in either house of the legislature—more nearly one third—and their votes would be split among four areas in quite different parts of the State. There is no suggestion that the apportionment can be defended on the basis of contributions to the cost of State government. The discrimination infects both houses of the legislature. It results not from recent developments of which the legislature may take account, but from sixty years of inaction. The majority has no other remedy such as the direct referendum. Thus, not only is there no justification for the denial of equal representation which the State authorities are in a position to assert; the apportionment cannot be supported upon any of the bases which other States have applied to their legislatures.

On the merits, therefore, and on this record the present case is hardly distinguishable from *Gomillion* v. *Lightfoot*, 364 U.S. 339. In *Gomillion* the complaint alleged a claim of racial discrimination. "Against this claim," the Court pointed out (p. 342), "respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The

respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions * * *. We freely recognize the breadth and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions * * *."

In the present case the complaint amply alleges a claim of gross geographical discrimination. Against this claim the appellees have never suggested, either in their briefs or in oral argument, any countervailing purpose which the Tennessee apportionment is designed to achieve. We recognize the breadth and importance of the State's political power to apportion representation in its legislature, but we submit that to exalt this power into an absolute is to misconceive the reach and meaning of the Fourteenth Amendment. It is unsound to distinguish *Gomillion* from the present case on the ground that it arose under the Fifteenth Amendment. The Fourteenth Amendment protects the right to vote (*Nixon* v. *Condon*, 286 U.S. 73) and arbitrary geographical distinctions are scarcely less invidious than discriminations based upon race.

C. THE JURISDICTION OF THE DISTRICT COURT MAY BE SUSTAINED WITHOUT DETERMINING WHETHER THE COMPLAINT STATES A CAUSE OF ACTION

Although we believe that the appellants have alleged sufficient facts to show violation of both the equal protection and due process clauses of the Fourteenth

Amendment, we also recognize that the question is so novel and so complex that this Court might well conclude that it should not be determined, even to the extent of ruling on the pleadings, without a full and detailed examination of the merits by the three-judge district court. If there be doubt whether the complaint states a cause of action, it would be not only proper, but perhaps advisable, to remand the cause without resolving this constitutional issue.

The court below dismissed the complaint for want of jurisdiction. We show in Point II, below, that this ruling was in error. Appellees also moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Although the district court commented that this case involves a "clear violation" of the rights of appellants (R. 219), it granted the motion to dismiss the complaint for failure to state a claim upon which relief could be granted because it found that it lacked jurisdiction to provide a remedy. Thus, this Court has not received the benefit of full consideration of the constitutional question on its merits by the court below.

The dismissal for want of jurisdiction, if erroneous, can properly be reversed without consideration of the merits. As Justice Holmes said in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271, 273. "[I]f the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Bell* v. *Hood,* 327 U.S. 678, is squarely in point. There plaintiffs' right of recovery was contingent upon the scope of the protection afforded by the Fourth and Fifth Amendments, so that recovery would be had if

the amendments were construed in one way but denied if construed in another. The Court held that there was jurisdiction without resolving the constitutional issue, saying (*id.* at 682):

> Jurisdiction therefore is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. * * * Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

The only exceptions to this doctrine are cases in which the federal claim is patently frivolous, or is immaterial and made solely for the purpose of obtaining federal jurisdiction over a State cause of action. *E.g., Water Service Co.* v. *City of Redding*, 304 U.S. 252; *Norton* v. *Whiteside*, 239 U.S. 144. The present case does not fit either exception. Whatever its ultimate merit the complaint is squarely founded upon the Fourteenth Amendment, and it presents a substantial claim.

II

THE DISTRICT COURT HAD, AND SHOULD HAVE EXERCISED, JURISDICTION OVER THIS ACTION TO REDRESS AN UNCONSTITUTIONAL MALAPPORTIONMENT

The general jurisdictional statute, 28 U.S.C. 1343, provides that the district courts of the United States shall have original jurisdiction over a—

> civil action authorized by law to be commenced by any person:
>
> * * * * * *

> (3) To redress the deprivation, under color of any State law * * * of any right, privilege or immunity * * * secured by the Constitution of the United States * * *.

See also 42 U.S.C. 1983, derived from the Civil Rights Act of April 20, 1871, 17 Stat. 13, which specifically authorizes suits in equity as well as other appropriate forms of redress.

The present case falls squarely within the foregoing jurisdiction. The complaint seeks to redress the deprivation by State officials of rights, relating to the elective franchise, which are secured by the due process and equal protection clauses of the Fourteenth Amendment. The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters. In *Ex parte Yarbrough*, 110 U.S. 651, this Court held that once the State has defined the class of persons entitled to vote (in that case, for a member of Congress) the right of any member of the class to vote is protected by the Constitution. That right is enforceable in the courts. *Nixon* v. *Herndon*, 273 U.S. 536; cf. *Wiley* v. *Sinkler*, 179 U.S. 58. If the denial of the right to cast a ballot is of a sufficiently "private" character to give the victim standing to sue for relief, a denial of the right to cast an effective ballot cannot logically be treated as a "public" wrong so as to deprive the victim of standing. Thus, federal jurisdiction is also sustained by such precedents as *Smith* v. *Allwright*, 321 U.S. 649, and *Gomillion* v. *Lightfoot*, 364 U.S. 339.

The standing of private persons to bring an action in federal courts to challenge an illegal apportionment was recognized in *Smiley* v. *Holm*, 285 U.S. 355. There, a unanimous Court reviewed the merits of, and granted relief in, a suit by a Minnesota "citizen, elector and taxpayer" (*id.* at 361) to enjoin the holding of a Congressional election pursuant to a State redistricting statute which violated the federal requirement that redistricting be carried out by the State's lawmaking power, including the approval of the governor. Similarly, in *Koenig* v. *Flynn*, 285 U.S. 375, the Court reviewed on the merits a suit brought by "citizens and voters" (*id.* at 379) of New York for a writ of mandamus to New York's Secretary of State to compel him to certify that Representatives were to be selected according to districts defined in a resolution of the State legislature. See also *Leser* v. *Garnett*, 258 U.S. 130; *Hawke* v. *Smith* (No. 1), 253 U.S. 221; *Stiglitz* v. *Schardien*, 239 Ky. 790, 40 S.W. 2d 315.

It plainly follows that the court below had jurisdiction unless some special judge-made rule relating to the justiciability of claims of malapportionment deprived the court of its normal statutory power to remedy the violation, under color of State law, of rights secured by the Fourteenth Amendment.

In discussing this central question it is essential to observe at the beginning the distinction between (i) a hard-and-fast rule denying jurisdiction over the subject matter, which would exclude from the federal courts all legal attacks upon unjust legislative representation, and (ii) an application of the doctrine that

a court of equity *may* decline to intervene in any particular case when it cannot frame a suitable remedy or its intervention would be contrary to the public interest. The distinction has significant legal and practical consequences:

A denial of jurisdiction over the subject matter excludes all malapportionment cases from judicial consideration as a category without regard to the seriousness of the constitutional wrong or the ability of the court to grant effective relief in the particular case. The complaint must be dismissed at the outset. On the other hand, taking jurisdiction of the subject matter, examining the merits and then asking whether equity can usefully intervene permits flexible treatment according to the necessities of the particular case. In some cases an injunction might issue. Other cases might have to be dismissed upon the ground that, whatever the wrong, there was no judicial remedy; but at least the court would have looked to the merits, appraised the degree of the wrong and the urgency of the need for judicial action as well as the difficulties, and determined whether the court could contribute to a solution, instead of disabling itself at the outset because of general misgivings about the effectiveness of its decrees.

The difference, in short, is between judicial power and equitable discretion. We submit that this Court has never held, and should not hold now, that the federal courts lack the power to deal with an unconstitutional legislative apportionment, however gross and easily remedied. On the other hand, we fully recognize the doctrine of equitable discretion, which may

sometimes call for the dismissal of an apportionment case without consideration of the merits. We shall show, however, that the exercise of sound equitable discretion under the circumstances of the present case requires, at least for the present, the retention of jurisdiction and the conduct of further proceedings upon the merits.

A. THE CONSTITUTIONAL ISSUE IS NOT A POLITICAL QUESTION BEYOND THE JURISDICTION OF THE FEDERAL COURTS

1. *The decisions of this Court show that the court below had jurisdiction.*

This Court has already sustained federal jurisdiction over legal controversies concerning apportionment. It has never held that the judiciary lacks power to deal with such cases. On the contrary, it has considered the merits of apportionment systems in several cases, and has granted relief in some of them. Thus, in *Smiley* v. *Holm*, 285 U.S. 355, the Court held that the existing Minnesota apportionment of United States Representatives did not meet federal requirements because the governor had refused to approve the bill, and accordingly the Court ordered an election-at-large. The Court also held a State apportionment law invalid (the governor had vetoed it) and ordered an election-at-large in *Carroll* v. *Becker*, 285 U.S. 380. In *Koenig* v. *Flynn*, 285 U.S. 375, the Court affirmed a decision of a State court holding that, in the absence of a valid districting statute (the governor had not approved the resolution of the State legislature) to conform to the increase in Representatives allotted to the State by Congress, the additional Representatives must be elected at large. And the

Court also took jurisdiction in *Wood* v. *Broom*, 287 U.S. 1, which involved the Reapportionment Act of 1911. There the Court, deciding the merits, refused to apply the Act—which required that Congressional election districts be of contiguous and compact territory and, as nearly as practicable, of equal population—because it applied only to districts formed under the 1911 Act and not to those formed under the Apportionment Act of 1929. Although the concurring opinion of Justices Brandeis, Stone, Roberts, and Cardozo is too short for one to be sure of their reasoning, it spoke only of a dismissal "for want of equity." That phrase suggests that under traditional equity principles an injunction should not issue, not that the courts are without jurisdiction to consider the merits because a nonjusticiable political issue is involved.

Colegrove v. *Green*, 328 U.S. 549, does not hold to the contrary. Mr. Justice Frankfurter, joined by two other Justices, would have held that State apportionment of Representatives is a political question beyond the power of the federal courts to decide, but a majority of the Justices participating (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that federal courts have the power to adjudicate the validity of the system of apportionment under attack. Mr. Justice Rutledge, whose vote was dispositive of the case, concluded that under *Smiley* v. *Holm*, *supra*, "this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable"; but, he said, the power should be employed "only in the most compelling circumstances" (*id.* at 565). Since such

circumstances were absent because of the shortness of time before the election, he decided that "the case is one in which the Court may properly, and should, decline to exercise its jurisdiction" [27] (*id.* at 566).

Shortly after the *Colegrove* case, the scope of the Court's decision became even more clear. In *Cook* v. *Fortson*, 329 U.S. 675, 678, involving the Georgia county unit system, Mr. Justice Rutledge described the actual ruling in the earlier case:

> A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion.[28]

In *Cook* v. *Fortson* Mr. Justice Rutledge would have postponed consideration of the issue of jurisdiction to the argument, even though he admitted that the order on appeal might "have become moot in part." *Id.* at 677. The Court, however, dismissed the bills, citing *United States* v. *Anchor Coal Co.*, 279 U.S. 812, which involved the dismissal as moot of a bill seeking an injunction.

The Court in *MacDougall* v. *Green*, 335 U.S. 281, passed on the merits of the claim that an Illinois

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[27] At this point Mr. Justice Rutledge quoted in a footnote from *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593: "The power of a court of equity to act is a discretionary one * * *."

[28] For a discussion of the equitable discretion aspect of the *Colegrove* decision, see pp. 68–85 below.

statute requiring a candidate of a new political party to obtain a specified number of signatures on his nominating petitions in fifty of the 102 counties in the State was unconstitutional. Mr. Justice Rutledge, in a separate opinion, stated that "this case is closely analogous to *Colegrove* v. *Green*" and "[e]very reason existing in *Colegrove* * * * which seemed to me compelling to require this Court to decline to exercise its equity jurisdiction and to decide the constitutional questions is present here. * * * As in *Colegrove* * * * I think the case is one in which * * * this Court may properly, and should, decline to exercise its jurisdiction in equity." *Id.* at 284, 286–287. No member of the Court suggested that the Court was without jurisdiction or power to consider the issue.

In *South* v. *Peters*, 339 U.S. 276, 277, the Court again recognized that the question is not one of judicial power but of its proper exercise. The decision was embodied in a single sentence: "Federal courts consistently *refuse to exercise* their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (emphasis added). None of the cases cited in support of this conclusion held that the issue involved was not justiciable. Reliance was placed on *MacDougall* v. *Green*, in which, as we have seen, the Court passed on the merits of a State election issue; *Colegrove* v. *Green*, in which a majority of the Court held that the federal courts have power to consider the merits of apportionment cases; and *Wood* v. *Broom*, in which the Court took jurisdiction but

four Justices said the bill should be dismissed "for want of equity" * (see p. 55 above).

In no subsequent apportionment case has this Court held, so far as we can determine, that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *Cox* v. *Peters*, 342 U.S. 936, involving an attack on Georgia's county unit laws, and *Remmey* v. *Smith*, 342 U.S. 916, involving a suit to compel reapportionment of the Pennsylvania legislature, the appeals were simply dismissed for want of a substantial federal question, without citation of authority. In *Anderson* v. *Jordan*, 343 U.S. 912, the Court dismissed the appeal on the authority of *Colegrove* v. *Green*, *MacDougall* v. *Green*, *and Wood* v. *Broom* (the opinion of the Court). As we have seen, in the latter two cases the Court considered the issues on the merits. In *Kidd* v. *McCanless*, 352 U.S. 920, involving an attack upon the same Tennessee apportionment law now before the Court, the appeal was dismissed on the authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan*. In *Radford* v. *Gary*, 352 U.S. 991, involving an attack on the Oklahoma apportionment laws, this Court affirmed the district court's dis-

* The Court in *South* v. *Peters* also cited as authority "cf. *Johnson* v. *Stevenson*, 170 F. 2d 108 (C.A. 5th Cir., 1948)." In that case, the court of appeals held that 8 U.S.C. (1946 ed.) 43, which is the same statute as is involved here, did not provide a remedy, as a matter of substance, for fraudulent returns in a Senate primary election: "We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law" (*id.* at 111). And, significantly, the court emphasized that the plaintiff did "not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it" (*ibid.*).

missal of the action, citing *Colegrove* v. *Green* and *Kidd* v. *McCanless*. And in *Hartsfield* v. *Sloan*, 357 U.S. 916, without citation of authority, the Court denied a motion for leave to file a petition for a writ of mandamus to compel the convening of a three-judge court to pass on the validity of the Georgia county unit laws."

Gomillion v. *Lightfoot*, 364 U.S. 339, which was decided only last term, makes it plain that a case is not removed from the domain of judicial review merely because the unconstitutional discrimination is accomplished by an exercise of the State's power to control its political subdivisions. The precise holding was that the Fifteenth Amendment prevents a State from fixing the boundaries of its municipalities in such a way as to deprive a citizen of his right to vote because of his race. But surely a case is not the more justiciable because it involved racial discrimination and

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[a] Where the Court has rejected attacks on apportionment systems without citation, it is of course impossible to know the basis of the decision. But such action is just as compatible with a determination that the case clearly does not present "compelling circumstances" necessary for federal judicial relief as with a holding of lack of power. Where the Court has cited *Colegrove* v. *Green*, the reason for this reliance is also not entirely clear. As we have seen, four of the seven Justices voting in that case upheld the power of the Court to consider the merits. The citation of the *Colgrove* decision to support rejection of attacks on state apportionment must therefore, we believe, mean reliance on the only holding of the prevailing majority in that case, *i.e.*, that an injunction was not justified in the circumstances. It cannot be assumed that the Court intended to settle this important issue of federal judicial power in accordance with the view of the minority of the Court in *Colegrove* v. *Green* by citing *Colegrove* in *per curiam* decisions, without the benefit of full briefing or oral argument.

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arises under the Fifteenth, instead of the Fourteenth, Amendment. The victims of the discrimination are no less identifiable in the present case.

In the *Gomillion* case, the Court distinguished *Colegrove* v. *Green* on the ground that *Colegrove* involved legislative inaction causing dilution in voting strength, in contrast to affirmative legislative action to deprive Negroes of their right to vote. The distinction between legislative action and inaction does not go to the power of the federal courts to hear the case, but at most to the appropriate remedy. In the instant case, as in *Gomillion*, the suit is one to enjoin State officials from taking affirmative action, in the future, which would deprive the complainants of their constitutional rights. The character of the controversy is not changed nor its justiciability altered by the vintage of the legislation under which the State officials propose to act. The distinction is important only because it *may* affect the remedy. In *Gomillion* it was possible to fall back upon the old law establishing Tuskegee's boundary if the enforcement of the new statute were enjoined. In *Colegrove* v. *Green* the Court would have been left at large if the challenged apportionment were invalidated. But there might well be another acceptable basis of allocation upon which to fall back in an apportionment case. Suppose that the Tennessee legislature were to enact a valid statute apportioning legislative seats among the counties in exact proportion to the qualified voters and that, a month later, the legislature passed another law making the present apportionment. The remedy

would be obvious and easy to administer but the case would be neither more nor less justiciable than it is today. In another apportionment case the old law might not be available to fall back upon as a remedy but there might be other simple and effective forms of relief. For example, the State constitution might provide that the legislature should decennially apportion seats in the lower house with one representative from the smallest county and representatives from each of the other counties in direct ratio to the number of eligible voters with no limitation upon the size of the legislature. If the legislature failed to make the apportionment for sixty years despite radical shifts in population, a court could easily adjudicate the constitutional question and grant relief.

The lesson to be drawn from *Colegrove* v. *Green*, *Gomillion* v. *Lightfoot* and these examples, we submit, is that the propriety of judicial action in this class of cases must be analyzed in terms not of jurisdictional power, but of equitable discretion. There is no jurisdictional bar to adjudicating the constitutional issue. The propriety of exercising equitable jurisdiction depends upon the court's ability to frame fair and effective judicial relief. In *Colegrove* v. *Green* an effective decree could not be devised within the limits of the judicial function before the election without risking still greater unfairness. In *Gomillion* the remedy was plain. We shall show below that in the present case there is every reason to believe that suitable relief can be granted if the complainants prove their case.

2. Colegrove v. Green is distinguishable from the present case.

Even if the views expressed by Mr. Justice Frankfurter in *Colegrove* v. *Green* had prevailed, the precedent would not control the present case both because of important distinctions and because its rationale has been undermined by subsequent developments.

(a) *Colegrove* v. *Green* dealt with the apportionment of Congressional districts. The opinion relies heavily upon the power of the House of Representatives to judge the qualifications of its own members under Article 1, Section 5, and of Congress to regulate the time, place, and manner of holding elections under Article 1, Section 4 (328 U.S. at 554):

> The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.

Article 1, Sections 4 and 5, are obviously not relevant to the apportionment of the legislature.

It may be suggested that the Congress has a comparable power to deal with the unconstitutional apportionment of a State legislature under its power to enforce the Fourteenth Amendment "by appropriate legislation" (Amend. XIV, Sec. 5). This Court has always dealt with any violation of the Fourteenth Amendment whenever presented by an actual case or controversy without awaiting implementary legislation beyond the general statute conferring jurisdiction to remedy deprivations of Fourteenth Amendment rights under color of State law (see pp. 50–51 above). It is unlikely that Congress could

legally or practically do more to secure the fair apportionment of State legislatures. The power of Congress to implement the Amendment is "by appropriate legislation," which may well impliedly exclude Congressional "adjudication" of the validity of any particular malapportionment. As a practical matter the most that Congress could be expected to do is to enact legislation, phrased in the general terms of the Fourteenth Amendment, which directed the courts to deal with violations of the constitutional standard. Judicial adjudication and relief is the nub of the bills recently introduced in Congress to remedy the evils of the malapportionment of State legislatures. S.J. Res. 215, S. 3781, and S. 3782, 86th Cong., 2d Sess. (1960).

(b) The Civil Rights Acts of 1957 and 1960, both enacted subsequent to the decision in *Colegrove* v. *Green*, also show that the election process is not now to be regarded as exclusively political in nature. The 1957 Civil Rights Act included a provision expressly conferring jurisdiction upon the federal district courts to hear actions "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" 28 U.S.C. 1343(4) (emphasis added). Congress thereby made clear that, in its view, questions involving "political" rights, "including the right to vote," were "meet for judicial determination." Cf. *Colegrove* v. *Green, supra*, 328 U.S. at 552. The 1960 Act specifically authorized the federal courts to consider applications for registration for voting under certain circumstances, so as to afford complete judicial protection against discrimination. 74 Stat. 90. Congress thereby

emphasized, once again, the national policy of relying on the judiciary as the organ through which the right to vote is to be made fully effective. Both acts express the intent of Congress and the national consensus that, whatever disagreement may exist as to other civil rights, (1) the right to vote should be afforded federal protection to the fullest possible extent, and (2) its protection should principally take the form of judicial action.

(c) In *Colegrove* v. *Green*, Mr. Justice Frankfurter also placed much reliance upon the difficulty of finding an effective and appropriate judicial remedy for the alleged wrong. If the court invalidated the existing apportionment, new districts would have had to be laid out on the map of Illinois without any guidance save the need for twenty-five districts with compactness of territory and approximate equality of population. Not only were there a wide number of theoretical possibilities from which the court would have had to choose without guidance, but also the choice would be one which is usually made with an eye to purely political considerations and which would almost surely affect the balance of political power in the Illinois Congressional delegation if not in the Congress itself. The only alternative would have been to order an election at large, a form of relief which might well have created more inequities than it cured. See 328 U.S. at 565–566. But this is not a reason for adopting a rule that the federal courts have no jurisdiction in any apportionment controversy. In the first place, it seems plain that in many such cases there would be no problem in

devising an appropriate judicial remedy. Second, several courts have found judicial remedies which effectively terminated at least the most serious aspects of a malapportionment. *E.g., Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705; *Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.); see Lewis, *Legislative Apportionment and the Federal Courts*, *op. cit., supra*, pp. 1066-1068. Third, there is every reason, as we show at pp. 74–85 below, to believe that appropriate judicial remedies can be applied in the present case.

3. *Luther v. Borden, 7 How. 1, and similar cases are distinguishable from the case at bar.*

Luther v. *Borden*, 7 How. 1, was an effort to have the federal courts determine the legitimacy of two rival governments, both of which claimed the right to rule Rhode Island during the Dorr Rebellion. Plaintiff brought an action of trespass against defendants who justified the entry upon the ground that they were privileged under the authority of the charter government. Plaintiff replied that the charter government was illegal and therefore the justification failed. This Court upheld the ruling of the lower courts that "the inquiry proposed to be made belonged to the political power and not to the judicial." *Id.* at 30. A similar decision was rendered in *Pacific Telephone Co.* v. *Oregon*, 223 U.S. 118, where plaintiffs sought to enjoin the collection of an Oregon tax upon the ground that the State government which sought to levy the tax was unconstitutional under Article IV, Section 5, because it was not republican in form. The bill was dismissed for want of jurisdiction.

These cases are clearly distinguishable from the present controversy for at least two reasons.

(a) In both *Luther* v. *Borden* and the *Pacific Telephone* case the attack was upon the legitimacy of the entire State government. The point clearly appears from the opinion of Chief Justice White in the latter case (223 U.S. at 150):

> Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court * * *.

~~In international law the recognition or nonrecognition of the legitimacy of a foreign government is a political decision.~~ In *Luther* v. *Borden* this Court applied the rule of international law that the recognition or non-recognition of the legitimacy of a foreign government is a political decision to relations between the United States and its constituent states. 7 How. at 44; see also the dissenting opinion of Mr. Justice Woodbury, *id.* at 56–57. The Court pointed out that the Constitution treats the issue as a political question. When the Senators and Representatives from a State seek admission to Congress and when the President is called upon to suppress an insurrection, or when Congress is called upon to execute the guarantee of a republican form of government, it is

a political arm that determines the status of the State government. *Id.* at 42–44.

The case at bar involves no question concerning the legitimacy of the government of Tennessee. The bill seeks to prevent the election officials from conducting future elections in a manner which deprives the complainants of their rights under the Fourteenth Amendment. Complainants do not challenge the legitimacy of any previously chosen legislature or the validity of any of its enactments. This case is therefore as different from *Luther* v. *Borden* and subsequent cases in the same line of authorities as are the decisions in *Nixon* v. *Condon,* 286 U.S. 73, *Smith* v. *Allwright,* 321 U.S. 649, and similar cases.

(b) One of the major elements in the decision in *Luther* v. *Borden* was the fear that sustaining a legal challenge to the legitimacy of a purported government would leave people of the State without an authority to govern their affairs. 7 How. at 38. The Supreme Court of Tennessee expressed the fear that the same consequences might follow from sustaining the bill for a declaratory judgment in *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. The Tennessee court determined that to hold the 1901 Apportionment Act unconstitutional would leave Tennessee without a legislature because there was no previous apportionment act to fall back on; therefore no legislature would be in existence which could pass a new apportionment act. If relief is ultimately granted here, however, the court need not determine the validity of 1901 Apportionment Act as of the time of its

enactment or even of the decree, but need determine only that the application of the Act in the next election would be unconstitutional; and although the reasoning behind such a determination might lead to the inference that constitutional rights had been ignored in past elections, the decree would not adjudicate that question.

Kidd v. *McCanless, supra,* does not require a contrary conclusion. The Tennessee court seems to have assumed that it was required to pass on the validity of the present legislature and did not consider whether its decree could be limited to future elections. In the present case it is possible to grant only prospective relief. This Court is not bound, moreover, by any State decisions concerning the legal consequences of a federal decree. The consequences to follow, like the remedy, would depend upon federal law. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176; *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395.

B. THE EXERCISE OF SOUND EQUITABLE DISCRETION REQUIRES THE FEDERAL COURTS TO RETAIN JURISDICTION AND ADJUDICATE THE MERITS OF THE PRESENT CONTROVERSY

The power of a court of equity is discretionary. Even when the court has jurisdiction of the subject matter and there is no adequate remedy at law, it may stay its hand in the public interest, or because a balance of convenience requires the denial of equitable relief, or even because a suitable decree could not be framed and enforced without entangling the court in non-judical functions. *Pennsylvania* v. *Williams,* 294 U.S. 176, 185; *American Federation of Labor* v. *Watson,* 327 U.S. 582. A clear illustration in the field of private litigation is the ancient rule that even

though the complainant prove the making and non-performance of a construction contract under circumstances in which there is no adequate remedy at law, nevertheless the court will deny specific performance if the administration of a decree would require the court to entangle itself in planning and building the project. *Errington* v. *Aynsly*, 2 Dick. 692; Pomeroy, *Specific Performance of Contracts* (3d ed.), Section 312.

This doctrine of equitable discretion underlies the position taken by Mr. Justice Rutledge in *Colegrove* v. *Green*, 328 U.S. 549, 564. He indicated that the difficulty of framing a suitable decree and the possible damage to the public interest from interfering in an imminent election were sufficient reasons for the Court to decline to exercise its jurisdiction. See also *MacDougall* v. *Green*, 335 U.S. 281. And it was on this ground that the four concurring Justices voted to have the bill dismissed in *Wood* v. *Broom*, 287 U.S. 1.

In the present case the equities require the district court to retain the bill and adjudicate the merits. The seriousness of the wrong, the need for judicial assistance, the absence of other available relief, and a high probability that the court can frame an adequate remedy if the Tennessee legislature continues to refuse to act, present compelling circumstances to invoke the chancellor's conscience.

1. *The merits of the present case can be adjudicated without intruding into the legislative or political process.*

In protecting voting rights the due process clause condemns arbitrary and capricious discrimination.

"To assume that political power is a function exclusively of numbers" may misjudge "the practicalities of government" (*MacDougall* v. *Green*, 335 U.S. 281, 283), but an apportionment which denies qualified voters political equality must be founded in some rational consideration. In addition to the desirability of numerical equality a rational and fair-minded man might take into account factors such as geography, existing governmental subdivisions, and history. After some foundation for a particular apportionment is assembled, the Court must determine whether this justification has the rationality required by the Fourteenth Amendment. See pp. 32-34 above.

In the present case one does not reach the latter question. The only basis of apportionment prescribed by the Tennessee constitution is equality of representation in relation to voter population. It is not suggested that any other factor or standard has been taken into account by the Tennessee legislature in allowing the 1901 apportionment to continue. Thus, the only question is whether an apportionment which overrepresents some voters and underrepresents others in the ratio of 19 to 1 can be said to be "rooted in reason" where the only basis suggested for the apportionment is equality of representation per voter population. This question is no harder for a court to answer than other constitutional questions which the courts have been adjudicating for decades.

2. *The seriousness of the wrong calls for judicial action.*

The complaint shows that roughly one-third of the State's voters elect a majority of the Senators, and

that one-third elects a majority of the representatives even under the 1950 census. The imbalance is worse today. Thus, it is only a slight exaggeration to say that one-third of the voters of Tennessee rule the other two-thirds in the enactment of legislation. A vote for the State House of Representatives in Moore County has nineteen times the weight of a vote in Hamilton County. A vote in Stewart or Chester County has almost eight times the weight of a vote in Shelby or Knox County. The discrimination runs against the cities.

We pointed out earlier in general terms the dangerous consequences of arbitrary interference with voting rights. See pp. 39–44 above. The practical consequences in Tennessee are described at length in the pleadings and in appellants' brief. They show that the State legislature has systematically imposed a discriminatorily larger proportion of State taxes on underrepresented areas but returned a smaller proportion of State funds and of federal grants to Tennessee on a matching basis.

The problem is not peculiar to Tennessee. Underrepresentation of urban voters, as we have shown at pp. 35–44 above, is more serious with regard to elections for the State legislature than to congressional elections; itself promotes Congressional malapportionment; and has seriously undermined responsible State and local government, particularly by causing the State legislatures to ignore pressing urban needs. The urgency of the situation cannot enlarge the jurisdiction of the federal courts but it demonstrates that

judicial action which is clearly within the power of the federal judiciary should not be withheld because some undefined practical political realities might be supposed to tip the balance of convenience. In these circumstances, we believe that the federal courts should exercise their equitable discretion to consider the merits of allegations that gross malapportionment of a State legislature violates the Fourteenth Amendment.

3. *Complainants have no remedy outside the federal courts.*

The citizens of Tennessee who suffer from discrimination under the alleged malapportionment have already exhausted their remedies in the State courts. In *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.E. 2d 40, appeal dismissed 352 U.S. 920, the Supreme Court of Tennessee refused to consider on its merits the constitutionality of continued use of the 1901 Apportionment Act. Had this step not been taken the principles of equitable abstention might dictate that the district court hold the case until the parties repaired to the appropriate State court for resolution of the State issues—for example, in order to avoid the necessity of deciding a federal constitutional issue or to give the State courts an opportunity to decide, authoritatively, undecided issues of State law. See, *e.g.*, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *American Federation of Labor* v. *Watson*, 327 U.S. 582. Although the federal courts have generally refused to apply the abstention doctrine in civil rights cases, (*e.g.*, *Lane* v. *Wilson*, 307 U.S. 268; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903),

the procedure has considerable attractiveness in cases of State legislative malapportionment because it would avoid federal involvement and interference in the basic framework of State government. See, *e.g.*, *Matthews* v. *Rodgers*, 284 U.S. 521, 525; *Railroad Commission* v. *Pullman Co.*, *supra*, 312 U.S. at 500; *Martin* v. *Creasy*, 360 U.S. 219, 224. But in the present case the decision already rendered by the Supreme Court of Tennessee makes it plain that delaying federal action to permit relitigation of the questions in the State courts would lead to an unnecessary proliferation of actions without foreseeable benefit."[11]

It is equally plain that the complainants have no political remedies in Tennessee. The violation of the State constitution has continued for half a century. The discrimination against complainants and persons similarly situated, which violates the Fourteenth Amendment, has become worse with legislative inaction in the face of changing conditions. The 50 representatives elected by the one-third of the voting population who control the lower house of the legislature are not likely to vote to surrender their power. Seventeen of the 50 could not go back to the next session if a fair apportionment bill were enacted. Significantly sixty percent of the voters elect only 36 of the 99 members of the House and no reappor-

[11] "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together'. In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

tionment bill since 1901 has received more than 36 votes in the House; and sixty-three percent of the voters elect only 13 of 33 members of the Senate and no reapportionment bill since 1901 has received more than 13 votes in that body (R. 28–31).

Complainants cannot circumvent the legislature by calling a constitutional convention because in Tennessee only the legislature could call the convention. Tenn. Const., Art. XI, Section 3. Tennessee has no provision for a popular referendum.

Congress may have the power under Section 5 of the Fourteenth Amendment to pass general legislation correcting malapportionment of State legislatures which violate that Amendment. But as a practical matter this remedy is unrealistic. Congress has steadily refused to act in this area. Were it to intervene, it could hardly do more than reiterate the general standards of the Fourteenth Amendment and provide a judicial remedy. It cannot be expected to deal with the specific problem in Tennessee and, as we have shown at pp. 50–51 above, it has already conferred the necessary general jurisdiction upon the federal courts to redress violations of constitutional rights under color of State law. Thus, as Judge Miller stated below (R. 91), "[t]he situation is such that if there is no judicial remedy there would appear to be no practicable remedy at all."

4. *There is every likelihood that the district court can frame effective relief without overstepping the limits of judicial action.*

One of the major barriers to the exercise of equity jurisdiction in some apportionment cases is the ex-

treme difficulty of framing an effective remedy which is confined within the proper limits of the judicial function. In *Colegrove* v. *Green*, 328 U.S. 549, those members of the Court who rejected the suggestion of an election at large were faced with the problem of remapping the Illinois Congressional districts with no guidance except a blank sheet and the figures on population. This appeared to be a hopeless task and is one which, under American traditions, is extremely political.

There is no such difficulty in the present case because the Tennessee constitution provides more precise guidelines (Tenn. Const., Art. II, Section 4–6): (i) Seats in both houses of the legislature are required to be apportioned according to voter-population. (ii) So far as possible the apportionment is to be by counties. (iii) A county may not be split into two or more districts. (iv) Where two or more counties are merged into a single district they must be adjacent. These requirements, together with the principle that judicial relief should be held to the minimum necessary to vindicate constitutional rights, greatly reduce the number of possible apportionments. In the instant case the district court could fairly start with the existing representative and senatorial districts and, using these principles, the court could readily eliminate the existing unconstitutional discriminations with a minimum of directions to the election officals.

The existing senatorial districts are shown on the map opposite R. 24. Thirty-three senators must be chosen. Using the 1950 census as if it were current,

each district would ideally have 60,000 voters. The Eighth district (Hamilton County) has one senator for 130,000 voters. The 32nd and 33rd Districts (Shelby County), the 16th and 17th Districts (Davidson County), and the 5th District (Knox County), are also grossly underrepresented. There are other districts which have less than half the ideal number of voters, and in several cases they are adjacent. By combining the following adjacent overrepresented districts and allowing them to choose only one senator, seats could be made available for the grossly underrepresented urban areas:

(1) Combine the 13th and 14th districts into a single district with 56,658 voters and give the seat released to Hamilton County which would then have two senators with 65,000 voters for each.

(2) Combine the 18th and 19th districts into a single district with one senator for 56,858 voters and give the seat released to Davidson County, which would then have three senators for 212,000 voters, or about 70,000 voters per senator.

(3) Combine the 21st and 23rd districts into a district with 53,129 voters, and give the seat released to Knox County.

(4) Combine the 24th and 27th districts and give the seat to Shelby County.

(5) Finally, take Tipton County out of the 30th district and add it to the 29th. The 29th district would then have just about 60,000 voters. Shelby County would then constitute the 30th, 32nd, and 33rd senatorial districts and an additional seat would be added taken from the 24th and 27th. This would give

Shelby four seats for 312,000 voters or one senator for each 78,000 voters instead of 1 for each 109,000 voters as it is today.

By ordering the defendants to conduct the next election of State Senators in accordance with the existing Tennessee election laws, subject to these five changes, the district court could eliminate the worst of the current injustices in the apportionment of State Senators. None of the proposed changes involves splitting an existing district. No new lines have to be put on the map. The merged districts would be made up of two compact continuous areas. Most of the districts and nearly all the boundary lines laid out by the Tennessee legislature would be preserved intact. And while the court might not achieve quite as fair an apportionment of the State Senate as the legislature could make, the most egregious wrongs would be corrected.

The same observations apply to the Tennessee House of Representatives. By ordering the election conducted in accordance with the present election laws but combining ten pairs of grossly over-represented counties one could give a much fairer representation to the areas around Memphis, Nashville, Knoxville, and Chattanooga and thereby eliminate most of the injustice in the present apportionment (see the existing House districts on the map opposite R. 26):

(1) Combine Lake and Obion Counties in 1 district.

(2) Combine Crockett and Haywood Counties in 1 district.

(3) Combine Hardeman and Chester Counties in 1 district.

(4) Combine McNary and Hardin Counties in 1 district.

(5) Combine Williamson and Cheatham Counties in 1 district. (Williamson loses its separate representative and Robertson has a separate representative but no part in district 18.)

(6) Combine Dickson and Hickman Counties in 1 district.

(7) Combine Moore and Coffee Counties in 1 district.

(8) Combine Warren and Cannon Counties in 1 district.

(9) Combine Jackson and Smith Counties in 1 district.

(10) Combine White and DeKalb Counties in 1 district.

Four of the representatives saved would be given to Shelby County, two to Knox County, two to Davidson County, and two to Hamilton County.

We do not suggest that this is an ideal solution or even that it is free from substantial flaws. We outline it for the sole purpose of showing concretely the practicability of granting the complainants greater protection by easily administered judicial relief. If the court is forced to proceed to a final decree, the suggested decree would not be complex. Framing it would involve no nice choices. No political considerations could enter into the decision. There is no wholesale remapping of the existing districts. And, there is nothing nonjudicial or extra-judicial about such relief.

A federal court should be slow, however, to enter even this type of decree; and there is reason to be-

lieve that it would never become necessary. Legislative inaction is encouraged by the courts' declining jurisdiction. A ruling sustaining the judicial power to adjudicate the constitutionality of an apportionment on the merits would stimulate legislative action not only in Tennessee but elsewhere. This is particularly true when the assertion of jurisdiction is coupled with a judicial admonition which focuses public attention upon the problem. There are excellent political reasons for a legislature to prefer reapportioning itself over reapportionment by a court. Thus, in *Magraw* v. *Donovan,* 159 F. Supp. 901 (D. Minn.) a suit attacking the apportionment of the Minnesota legislature was referred to a three-judge court. That court stated (163 F. Supp. 184, 187):

> Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes * * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to redistrict."

At the 1959 session, the legislature enacted a new apportionment act and the litigation was dismissed. 177 F. Supp. 803. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii), discussed in Lewis, *op. cit. supra,* pp. 1088–1089. There is even reason to believe that the Illinois Congressional districts were reapportioned after the decision in *Colegrove* v. *Green*

because the political leaders feared that a new suit would bring judicial intervention; the original bill was dismissed by a four to three division in this Court and the decisive vote of Mr. Justice Rutledge stemmed partly from his reluctance to interfere in an imminent election. See Lewis, *op. cit. supra*, p. 1088.

If the Tennessee legislature failed to act following the assertion of jurisdiction, the district court might proceed to adjudicate the merits and, if it found a violation of the federal Constitution, enter an interlocutory decree reserving final action in order that the legislature should have the opportunity to act and the court to receive evidence as to the appropriate remedy. A judicial determination that the present mode of apportionment is illegitimate, even without any remedial implementation, is bound to have a profound effect upon a legislature. The concept of legitimacy has a power of its own. Governing bodies do not lightly reject an authoritative declaration by a constitutional organ of government to the effect that a challenged course of action is unlawful.

The efficacy of this procedure is illustrated by *Asbury Park Press, Inc.* v. *Woolley*, 33 N. J. 1, 161 A. 2d 705, where the New Jersey Supreme Court held that it had "[t]he authority and the duty" to act in cases of malapportionment. 161 A. 2d at 710. After citing numerous cases in which other courts had accepted this same responsibility,[22] the court held (161 A. 2d at 711):

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[22] See *Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii); *Shaw* v. *Adkins*, 202 Ark. 856, 153 S.W. 2d 415; *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757; *Moran* v. *Bowley*, 347 Ill. 148, 179

> From the foregoing it is manifest that the triunity of our government is not invaded by acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence.

Despite recognition of its power to act, the court did not order any particular relief. Instead, it retained jurisdiction of the cause from the date of decision, June 6, 1960, until the legislature had time to reapportion under the 1960 census figures. The court assumed that the legislators would act pursuant to their

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N.E. 526; *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980; *Denney* v. *State*, 144 Ind. 503, 42 N.E. 929; *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836, rehearing denied, 33 N.E. 119; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315; *Ragland* v. *Anderson*, 125 Ky. 141, 100 S.W. 865; *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N.E 562; *Donovan* v. *Suffolk County Apportionment Com'rs*, 225 Mass. 55, 133 N.E. 740; *Attorney General* v. *Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581; *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749; *Board of Sup'rs of County of Houghton* v. *Blacker*, 92 Mich. 638, 52 N.W. 951; *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944; *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40; *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1; *In re Sherill*, 188 N.Y. 185, 81 N.E. 124; *People ex rel. Baird* v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827; *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564; *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35; *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; see also *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105; Annotation, 2 A.L.R. 1337.

oath of office to uphold the State constitution. 161 A. 2d at 712. When the legislature took no action, the State court stated that it itself would act at 5 p.m. on February 1, 1961. The Governor thereupon convened a special session of the legislature and, at 3:13 p.m. on February 1, the legislature passed a reapportionment statute. The New Jersey Supreme Court, at 5 p.m., issued this statement (New York Times, February 2, 1961, p. 1, col. 2, p. 16, col. 5):

> We are informed that the legislature has adopted an apportionment bill which the Governor has signed. Litigation, accordingly, appears to be moot and hence the prepared opinion will not be filed.

Since one cannot be sure that another legislature would take the same action under similar circumstances, a district court would naturally be reluctant to assert jurisdiction without reason to believe that it could enter a fair and effective final decree. In appraising the potentialities of judicial intervention, however, it is only realistic to recognize the effectiveness of the interlocutory orders which can be entered at various stages of the proceeding and may dispense with the necessity of entering a final decree.

In the present case the district court would be free to choose among several forms of ultimate relief. Besides the remedy suggested above, the court might direct an election at large, following the course taken in other State and federal cases. See, *e.g.*, *Smiley* v. *Holm*, 285 U.S. 355; *Carroll* v. *Becker*, 285 U.S. 380; *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105. In *Kidd* v. *McCanless*, 200 Tenn. 273, 277, 292

S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920, the Tennessee Supreme Court stated that "[t]here is no provision of law for election of our General Assembly by an election at large over the State;"[*] but a federal court, in effectuating a federal right, is not restricted to the remedies provided by State law. *Deitrick* v. *Greaney*, 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 455-456; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176.

Another alternative is suggested by the opinions in *Asbury Park Press, Inc.* v. *Woolley*, *supra*, 33 N.J. 1, 161 A. 2d 705, 714. After an enumeration of qualified voters, existing patterns of over or underrepresentation would become apparent. In those cases where overrepresentation exists, a district court could order that the value of the vote of each representative or senator be reduced by the amount necessary to offset the overrepresentation. In other words, in overrepresented counties or districts, representatives and senators would be entitled to fractional, rather than full votes. Similarly, legislators from underrepresented districts would receive more than one vote each.

There are two other possibilities which involve neither remapping Tennessee nor an election at large. The election officials might be ordered to retain the existing districts, to call for the election of one representative from each district in the group with the

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[*] In *Brown* v. *Saunders*, the Virginia Supreme Court ordered an election at large despite the fact that the Virginia Constitution did not provide for such an election.

smallest population—perhaps those with 8,000 voters or less in electing representatives—and then to assign every other existing district a number of senators or representatives in the same ratio to one that its population bears to 8,000 without limiting the total number elected to either house. The figures would have to be rounded off to the nearest whole number. If it seemed preferable, although it would make the legislature very large, the existing senatorial districts could be retained with the new apportionment of seats but seats in the lower house might be allocated to the counties in proportion to the population.

These last solutions would override the provision of the Tennessee constitution limiting the total number of senators to 33 and representatives to 99. The objection is not fatal. By hypothesis the constitutional requirement of apportionment according to population is now being disregarded. If one constitutional requirement or the other must yield until the Tennessee legislature is prepared to act, the limit on the size of the legislature is obviously the less important.

The foregoing discussion of remedies is neither definitive or complete. We seek merely to show that there is no basis for assuming that the federal court would be helpless even if it were to find that complainants were being deprived of rights under the Fourteenth Amendment. We do not seek to show that any particular form of relief is practicable or desirable. On the contrary, we submit that this case should be approached, like other cases of alleged constitutional violation, by ascertaining whether the fed-

eral courts have jurisdiction over the issue presented. If they have jurisdiction, the constitutional issue should then be adjudicated. If a constitutional violation is found, then the question of a remedy should next be considered. We do not think the premise that the federal courts possess no appropriate remedies can be accepted at this early stage in the proceedings. In other cases under the Fourteenth Amendment the courts have found new and appropriate remedies among their broad and flexible equitable powers to prevent violations. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction or call for refusal to act.

In sum, there is urgent need for relief against an apparently unconstitutional malapportionment—relief which, in our submission, the federal court has power to grant and only it can give. Assuming that plaintiffs prove their case, there is great likelihood that a court of equity can devise an effective remedy to safeguard their constitutional rights. Under such circumstances the bill ought not to be dismissed at this early stage of the controversy without either determining the merits or fully investigating, after a hearing, the potentialities of effective relief.

CONCLUSION

For the foregoing reasons, we submit that the three-judge court had jurisdiction, and that this is an appropriate case for the federal courts to exercise their equitable discretion and consider the alleged violation

of the Fourteenth Amendment. We urge, therefore, that the judgment below be reversed and the case remanded to the three-judge court for consideration of the case on the merits.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 6.

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and

DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLEES.

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SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLEES.

The appellees, supplementing their brief and argument, respectfully show the following:

I.

THE QUESTIONS ARE INTERDEPENDENT.

The appellants and the Solicitor General, while insisting that the appeal is well founded, have clearly demonstrated both in their briefs and in their oral arguments that they

are opposed to this Court deciding the issues presented on appeal. Their objective is not to have this Court decide the case but to have this Court remand the case.

It must be remembered that the case is before this Court for the purpose of determining whether the three-judge District Court erred in the action taken by it. Before this Court can decide the issues and the action to be taken, it must first determine the exact questions adjudicated by the District Court and whether that adjudication was erroneous.

The District Court defined the issues as follows:

> "The action is presently before the Court upon the defendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court" (R. 216).

Thus, it will be noted that that court understood it was to determine (1) whether it had jurisdiction of the subject matter, (2) whether the complaint stated a claim *upon which relief could be granted,* and (3) whether all necessary party defendants were before the court.

Contrary to the contention of the appellants and the Solicitor General, the District Court decided, not one, but two of the issues before it. That court said:

> "Being of the opinion that the Court has no right to intervene or to grant the relief prayed for, it is unnecessary to discuss the further ground of the motion that the action must fail because of the non-joinder of indispensable parties as defendants" (R. 220).

If the District Court was of the opinion that it had left undecided only the third ground of the motion to dismiss, it necessarily was of the opinion that it had decided the first and second grounds of the motion. That this is the correct view clearly appears from the order entered by the District Court:

> ". . . in conformity with said per curiam opinion the first two grounds of defendants' motion to dismiss (1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, are sustained, defendants' motion to dismiss is granted, and the complaint is hereby dismissed" (R. 220-221).

Therefore, the District Court held (1) that it had no jurisdiction of the subject matter and (2) that the complaint failed to state a claim upon which relief could be granted.

What then, must this Court do? It must examine the District Court's reasons for its action.

Contrary to the appellants' assertion, the District Court did not find or hold that the appellants' rights under the Fourteenth Amendment had been violated. The rights referred to by the District Court were state rights. The Court said this:

> ". . . With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees" (R. 219).

The District Court did not hold that there was a violation of a federal right. It held just the opposite: that the complaint failed to state a claim upon which relief could be granted.

The District Court based its decision on two points. First, it held this:

> "The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. Colegrove v. Green, 328 U. S. 549; Cook v. Fortson and Turman et al. v. Duckworth, 329 U. S. 675; Colegrove v. Barrett, 330 U. S. 804; McDougal et al. v. Green, 335 U. S. 281; South et al. v. Peters, 339 U. S. 276; Remmey v. Smith, 342 U. S. 916 (fol. 283); Anderson v. Jordan, 343 U. S. 912; Kidd v. McCanless et al., 352 U. S. 920; Radford v. Gary, 352 U. S. 991" (R. 216).

The District Court also held this:

> ". . . the remedies suggested by the plaintiffs are neither feasible nor legally possible" (R. 217-218).

What does this mean? It means simply this:

(1) The jurisdiction of the District Court depends upon whether the complaint alleges a federal right which can be enforced.

(2) Whether the complaint alleges a federal right which can be enforced depends upon whether the District Court has jurisdiction to enforce that right.

As this Court said in *Equitable Life Assurance Society v. Brown*, 187 U. S. 308:

> ". . . the Federal question upon which the jurisdiction depends is also the identical question upon which

the merits depend . . . the two questions are therefore absolutely coterminous." 187 U. S. 315.

Thus, this Court cannot determine one of the questions without determining the other.

What does this mean?

It means that this Court cannot decide that the District Court has jurisdiction of the general subject matter and then remand the case for a trial to determine whether the complaint alleges a cause of action and whether that cause of action can be proved.

It means that this Court must not only determine the question of jurisdiction. It must also determine whether the complaint states a claim upon which the Federal District Court can grant relief.

The appellees respectfully insist that the complaint, when tested under the applicable rules, fails to state a claim upon which relief can be granted.

II.

THE COURT MUST DETERMINE WHETHER THE COMPLAINT IS SUBSTANTIAL.

The appellants have insisted that the complaint is not patently frivolous, that the allegations must be accepted by this Court as true, and that the case should be remanded to the District Court for trial.

In so contending, the appellants misconceive the issue and seek to misapply the applicable rules.

The Court, in *Radovich v. National Football League*, 352 U. S. 445, referred to *Hart v. B. F. Keith Vandeville*

Exchange, 262 U. S. 271, and stated that the test to be applied is whether the claim is wholly frivolous.

The rule stated in *Hart v. B. F. Keith Vandeville Exchange*, is this:

> "The jurisdiction of the District Court is the only matter to be considered on this appeal. This is determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." 262 U. S. 273.

The appellees urge that the decisions of this Court require the Court, in determining whether the complaint is wholly frivolous, to look to see whether the complaint states a claim that could be well founded.

In *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, the Court said:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this Court.'"

The Court then continued as follows:

> "Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy,

the motion to dismiss will prevail. *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited." 187 U. S. 311.

This Court has held that jurisdiction cannot be established by the mere assertion that there is a federal question. In *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, the Court said:

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit." 193 U. S. 576.

Thus, the Court must look to see whether the allegations in the complaint state such a claim that, if well founded, is within the jurisdiction of the District Court.

The appellees urge that the appellants' assertion that there is a federal right is nothing more than the statement of a legal conclusion. The allegations of the complaint are not substantial.

III.

THE COMPLAINT FAILS TO STATE A SUBSTANTIAL CLAIM.

The appellants seek to circumvent the rules for testing the sufficiency of complaints by making allegations that are completely theoretical. This Court will not permit a party to make a federal question by merely alleging that

there is a federal question. If such procedure should be permitted, the question of jurisdiction would be determined by the parties and not by the Court.

A. The Issues Do Not Involve Personal Rights.

What is the right which the appellants seek to enforce in this action? The complaint avers that:

> ". . . the plaintiffs as citizens of the United States and the State of Tennessee, have the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census" (R. 8).

And why do the appellants say that they have this right?

> ". . . this distortion . . . of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee. . . . contrary to the philosophy of government in the United States. . . ." (R. 13).

These are not allegations regarding a personal right. If the appellants possess this right, do not all citizens of Tennessee have the same right?

Clearly the appellants cannot aver that private and individual rights have been abridged when the complaint shows on its face that the rights are not private and individual.

In his most recent brief the Solicitor General states:

> "In referring to the Tennessee constitution we do not suggest that petitioners have a federal right to have the Tennessee legislature apportioned according to the State constitution" (p. 45).

The allegation of a violation of a personal right is wholly unfounded.

B. The Question Is Governmental in Character.

The Court must accept, as did the District Court, that the question is:

> "The question of distribution of political strength for legislative purposes. . . ." (R. 216).

The appellants, in their brief on the merits, pages 12 to 14, state that the basis of their complaint is this:

> ". . . the systematic use by the controlling minority of its powers . . . to derive special advantages at the expense of the under-represented majority of the people in such matters as the distribution of state funds."
>
> . . . . . .
>
> "These discriminatory distribution formulas in turn limit the counties in which appellants reside in the share they may obtain of federal aid for highway construction. . . ."

The Solicitor General, in his initial brief, pages 54 and 55, states the problem in this manner:

> "The malapportionment of state legislatures has the specific effect of precluding the states from meeting the burgeoning needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban. . . . The failure is reflected not merely in unresponsiveness to special urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. . . ."

These governmental problems should be contrasted with the issues in the cases cited by the appellants to sustain

the jurisdiction of this Court. *United States v. Cruikshank*, 92 U. S. 542; *Nixon v. Herndon*, 273 U. S. 536; *Terry v. Adams*, 345 U. S. 461; *Cooper v. Aaron*, 358 U. S. 1.

Do the allegations in the complaint state a violation of personal and individual rights? Or do they state a violation of public and governmental rights?

C. **The Claim of Discrimination Is Not Well Founded.**

The question of the distribution of political strength for legislative purposes concerns all of the citizens wherever located within the state.

The complaint avers that there is:

> "... a purposeful and systematic plan to discriminate against a geographical class of persons and deny them the equal protection of the law...." (R. 12).

The prohibitions against discrimination relate to personal and individual rights. Here the right is the right:

> "... to have the entire membership of the Tennessee Legislature reapportioned...." (R. 8).

Who composes the class? Obviously, it is composed of all of the citizens of Tennessee.

The allegation that the alleged discrimination is purposeful and systematic is nothing more than a formal averment. It is without substance.

There cannot be purposeful and systematic discrimination when the appellants themselves insist that the alleged discrimination is due (1) to the passage of time and (2) to shifts in population. This is what the appellants aver:

> "... The population of the State of Tennessee in 1900, based on the Federal Census of that year, was

2,021,000, while the population in 1950, based on the Federal Census of that year, was 3,292,000, and that the growth of the various counties of the State during this fifty year period has been very uneven" (R. 10).

The Solicitor General, in his present brief, says this:

". . . The malapportionment results chiefly from the changes in the distribution of the population during the passage of sixty years" (p. 46).

If this is how the alleged discrimination came into being, could the discrimination be purposeful and systematic?

This is a question of law for this Court and not a question of fact for the District Court to determine.

D. **The Alleged Injury Is Without Color of Merit.**

The alleged injury is without substance. The injury, the appellants say, is this:

"That the General Assembly of Tennessee, for a number of years, has denied to plaintiffs and other similarly situated the equal protection of the laws by unjustly discriminating against large segments of the population of the State in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the State through the exercise of the taxing power . . ." (R. 16).

The appellants do not, and cannot, point to a single Tennessee statute that imposes a discriminatory tax on any of them. Actually, they say that the discrimination is against,

". . . large segments of the population of the State. . . ."

Even this allegation is without "color of merit" because, as the appellees have previously demonstrated, the

state tax rate and the method of collection is the same in each of the ninety-five counties.

Likewise, there is no discrimination in the distribution of tax funds. Discrimination connotes some legal right which has been breached. There is no legal or constitutional requirement that the State return to a city or county an amount of tax funds equal to that collected in that city or county.

These alleged evils, the appellants say, are due to inadequate representation of the urban areas in the legislative halls. How can this be so?

For instance, the appellants, in the complaint, aver that Chapter 14, Public Acts of 1959, the General Education Act of 1959, was the result of the systematic plan of discrimination (R. 17). The truth of the matter is, as plainly shown by the record, that all thirty-three members of the state senate voted for the measure, and that ninety-one of the ninety-nine members of the lower house voted for the law (R. 211-212).

If the case should be remanded for trial, and the appellants proved the allegation that state tax funds are inequitably distributed to the appellants' cities and counties, would this constitute a legal injury? Obviously, the alleged injury is theoretical. If there is an injury, it is not to the appellants; it is to their cities and counties. If the injury is to the appellants' cities and counties, it is not a personal and private injury.

The allegations as to the alleged injury are without substance.

E. The Decree, If Entered, Would Be an Empty Form.

The appellants ask the Court to require the appellees to take certain action which they aver will result in relief. The complaint alleges:

"That the defendants, or their successors in office, unless prevented by this Court, will perform their duties as they and their predecessors in office have performed those duties for over fifty years under the unconstitutional Act of 1901, and the rights of these plaintiffs and all other qualified voters of Tennessee similarly situated, can be protected only by decree of this Court declaring the Act of 1901, together with all Acts amending it, to be unconstitutional, and by enjoining the defendants from holding another unconstitutional election in 1960, or thereafter, . . ." (R. 18).

The appellees do not hold elections. Suppose the case is remanded for trial and the District Court grants an injunction? What duties of the appellees will be thus enjoined? There are none that would affect the holding of the election.

As Mr. Justice Holmes said in *Giles v. Harris*, 189 U. S. 475, 488, all that the appellants could get would be an "empty form."

F. Action by the District Court Would Not Assure Reapportionment.

The insistence of the appellants that action by the District Court would result in reapportionment is theoretical. The District Court said this:

". . . Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate" (R. 218).

Suppose a legislature should be elected at large, and suppose that legislature redistricted the state pursuant to

the constitutional provisions? Would the legislature thus differently constituted distribute state tax funds in a different manner?

To say that any legislative body will vote in any particular manner on any measure, is to speculate.

The complaint is not well founded. It is so lacking in substance as to be without "color of merit." As this Court said in *Equitable Life Assurance Society v. Brown*, 187 U. S. 308:

> "... it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted. ..." 187 U. S. 314-315.

The complaint does not state a claim upon which relief can be granted.

IV.

ACTION BY THE DISTRICT COURT WOULD CONSTITUTE AN UNWARRANTED INTRUSION INTO THE POLITICAL AFFAIRS OF THE STATE.

In insisting that the District Court may grant appropriate relief, the appellants ignore (1) the principle of separation of powers and (2) the dual system of government in the United States.

This Court has held that whether a state adheres to the principle of separation of powers is a question solely for that state. In *Dreyer v. Illinois*, 187 U. S. 71, the Court said:

> "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and

separate, . . . is for the determination of the state." 187 U. S. 84.

In holding that it could not grant relief, the District Court said:

". . . Such a remedy would constitute . . . an unwarranted intrusion into the political affairs of the state" (R. 218-219).

". . . An election at large, directed by the Court, would indeed inject the Court into a 'political thicket'. . . ." (R. 218).

The Constitution of Tennessee, Article II, Section 2, provides that:

"No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

The appellees emphasize that the courts of Tennessee having followed the constitutional requirement consistently. In *Richardson v. Young*, 122 Tenn. 471, the Supreme Court of Tennessee said:

" 'It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the constitution (article 2, secs. 1 and 2). *The most responsible duty devolving upon this court is to see that this injunction of the constitution shall be faithfully observed.*' " (Emphasis supplied.) 122 Tenn. 492.

This thread is woven into the very fabric of the state government.

The courts of Tennessee, in passing on the validity of legislation will not consider whether the law is dictated by a wise or foolish policy or whether it will ultimately redound to the public good. "These are considerations solely for the Legislature." *Petition of Carter*, 188 Tenn. 677, 681. Nor will the courts consider the motive of the Legislature. *Cosmopolitan Life Insurance Co. v. Northington*, 201 Tenn. 541, 558.

The eligibility of a member of the Legislature to sit is solely a question for that body under the Constitution of Tennessee. The courts are without jurisdiction to pass on the question. *State ex rel. v. Shumate*, 172 Tenn. 451.

The courts of the state will not issue writs of mandamus to force public officials to perform discretionary duties. In *Peerless Const. Co. v. Bass*, 158 Tenn. 518, the Supreme Court of Tennessee said:

> "The writ of mandamus will lie to control only ministerial acts of public officers, and not to control official judgment or discretion. . . ." 158 Tenn. 524.

The Tennessee courts will not enforce a purely political right. The Supreme Court of Tennessee, in *Jared v. Fitzgerald*, 183 Tenn. 682, refused to entertain a suit by citizens on behalf of themselves *and the general public*, to vindicate the public's right to have the primary election laws properly administered.

Where an administrative body is required to make a decision, the Tennessee courts will not set the decision aside if there is any material evidence to support it. In *S. E. Greyhound Lines v. Dunlap*, 178 Tenn. 546, the Supreme Court, at page 555, said:

> ". . . Many of the cases dealing with certiorari are cases which arise from inferior judicial tribunals and in such cases it is entirely proper for the courts to

substitute their judgment for the judgment of the lower judicial tribunal, but it does not follow that the court should substitute its judgment for the judgment of an administrative body, *being another constitutional branch of government.*" (Emphasis supplied.)

The holding of the State Supreme Court in *Maxey v. Powers*, 117 Tenn. 381, is of particular significance. There an attack was made on a legislative act *redistricting a county*. In holding that the question was political and solely for the Legislature, the Court said:

"The general rule is that where one of the departments of the State is vested with a power, to be exercised when and in such manner as those charged with its exercise may consider expedient and proper in its discretion, the action of the department cannot be interfered with by any other department. *This is especially so in matters of a political character.*" 117 Tenn. 392-393.

. . . . . .

"The general assembly had the exclusive and absolute power to lay off Knox County into civil districts. How it should execute this power was for it to determine." (Emphasis supplied.) 117 Tenn. 398.

Can there be any doubt that the State of Tennessee adheres to the constitutional principle of separation of powers?

Reapportionment in Tennessee is a legislative function.

The judges composing the District Court, which sustained the motion to dismiss, are Tennesseans. They are familiar with the Constitution of Tennessee. They unanimously agreed that:

". . . Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted in-

trusion into the political affairs of the state" (R. 218-219).

To say, as do the appellants and the Solicitor General, that the question is not legislative and not political, is to close their eyes to one of the basic constitutional principles upon which the governments of the State of Tennessee and the United States are founded.

Action by the District Court would constitute an unwarranted intrusion into the political affairs of the State of Tennessee.

It follows that this Court should adhere to the doctrine of judicial self-limitation.

V.

THE DOCTRINE OF JUDICIAL SELF-LIMITATION SHOULD BE APPLIED.

The appellants and the Solicitor General attempt to emphasize the alleged difference between the question of whether the District Court has jurisdiction of the subject matter and the question of whether such jurisdiction should be exercised. They assert that the first question is one for this Court. They contend that the second question must be determined by the District Court.

The reason for this insistence is to have this Court remand the case, not for the purpose of trial and the entry of a decree, but for the purpose of forcing the General Assembly of Tennessee to take action. This is nothing less than an effort on the part of the appellants to have this Court authorize the District Court to coerce the Tennessee Legislature.

In their brief on the merits the appellants, on page 39, say:

> "By assuming and retaining jurisdiction and providing the legislature an opportunity to reconsider and correct the inequalities in voting and representation the court does not assume legislative tasks. The same is true at the point when the court expressly decides on the merits, if it is so required, that the apportionment is invalid. In the first case, on a prima facie showing, and in the second case, on a full showing and finding, the court simply exposes the deficiency in relation to constitutional requirements, and in effect remits the matter to the legislature for further action and revision, just as the court remands an erroneous order of an administrative agency for further action."

The District Court has held that whether the question is one of jurisdiction or whether it is one pertaining to the subject matter, the District Court cannot intervene. That Court said:

> ". . . the federal rule . . . is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type *to compel legislative reapportionment.*" (Emphasis supplied.) (R. 216).

The District Court also said:

> ". . . the remedy in this situation does not lie with the courts" (R. 219).
>
> ". . . the remedies suggested by the plaintiffs are neither feasible nor legally possible" (R. 217-218).

Therefore, the question for this Court is not merely one of jurisdiction; it is also one of the exercises of that jurisdiction.

Actually, the question is whether this Court will continue to adhere to the doctrine of judicial self-limitation. This is true because this Court is committed to that doctrine:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *South v. Peters*, 339 U. S. 276, 277.

Why is the doctrine applied? Is it because of a lack of jurisdiction, or is it because the exercise of such jurisdiction in certain instances is inimical to a proper functioning of the government generally?

In *Ware v. Hylton*, 3 Dall. 199, the Court said:

> "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." 3 Dall. 260.

Thus, the question may involve considerations of policy or may be of such a nature that courts are not competent to deal with it.

In *Kentucky v. Dennison*, 24 How. 66, the Court held that it would not enforce the provisions of Article IV, Section 2, of the Constitution, requiring a state to deliver a fugitive from justice to a sister state. The Court said this:

> "The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United State with this power. Indeed, such a power would place every state under the control and dominion of

the general government, even in the administration of its internal concerns and reserved rights." 24 How. 107.

Again, in *Mississippi v. Johnson*, 4 Wall. 475, the Court held that it could not enforce the constitutional requirement that the laws be faithfully executed. The Court said:

"An attempt on the part of the Judicial Department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation but to restrain such action under legislation alleged to be unconstitutional. *But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.*" (Emphasis supplied.) 4 Wall. 475.

In both *Kentucky v. Dennison* and *Mississippi v. Johnson*, the Constitution imposed duties, but the Court found that it could not require the performance of those duties.

Mr. Chief Justice Hughes, in *Coleman v. Miller*, 307 U. S. 433, stated that the test is this:

"In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." 307 U. S. 454-455.

Why has this Court applied the doctrine of judicial self-limitation in reapportionment cases?

The answer is clear. The question involves the constitutional guaranty of a republican form of government under Article IV, Section 4, and this Court has held that the question is governmental and political in nature.

In *Luther v. Borden*, 7 How. 1, the Court said that Congress must necessarily determine the question of whether a state government is republican in form. The Court said:

> "For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." 7 How. 42-43.

To insist, as do the appellants, that the Court is not barred from considering the question because it is political, is to disregard and brush aside the clear distinction which this Court has made between rights which are personal in nature and rights which are governmental in nature.

Perhaps no clearer distinction has ever been made than that of Mr. Chief Justice White in *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, when he said:

> "Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state." 223 U. S. 150.

The Chief Justice continued as follows:

> "It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on

the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, *but to demand of the state that it establish its right to exist as a state, republican in form.*" (Emphasis supplied.) 223 U. S. 150-151.

Thus, this Court will look to see whether the assault is actually made against an alleged unconstitutional law or whether it is the state itself that is assailed.

In the case now before the Court the answer is clear.

The appellants bring the suit on behalf of all of the citizens of Tennessee (R. 4). And for what purpose?

". . . the plaintiffs as citizens of the United States and the State of Tennessee, have the right conferred by the Constitution of the State of Tennessee to have the entire membership of the Tennessee Legislature reapportioned and elected on the basis of the 1950 Federal Census" (R. 8).

And why do the appellants say that they have this right?

". . . this distortion . . . of electing representatives to the General Assembly prevents it, as it is now composed, from being a body representative of the people of the State of Tennessee . . . contrary to the philosophy of government in the United States. . . ." (R. 13).

The alleged right is not a personal right. It is political and governmental in nature.

The Court should continue to adhere to the doctrine of judicial self-limitation. The concept of healthy federalism requires that it do so.

VI.

THE CONCEPT OF HEALTHY FEDERALISM REQUIRES THAT FEDERAL EQUITY POWERS NOT BE EXERCISED.

The concept of healthy federalism contemplates that there will be a minimum of conflicts in the increasingly difficult and delicate field of state and federal relationships.

There are many sound reasons why equity should stay its hand, and particularly in this case.

This Court has repeatedly held that it will not intervene in cases of this type. *Colegrove v. Green*, 328 U. S. 549; *Turman v. Duckworth*, 329 U. S. 675; *Cook v. Fortson*, 329 U. S. 675; *South v. Peters*, 339 U. S. 276; *Cox v. Peters*, 342 U. S. 936; *Remmey v. Smith*, 342 U. S. 916; *Anderson v. Jordan*, 343 U. S. 912; *Kidd v. McCanless*, 352 U. S. 920; *Radford v. Gary*, 352 U. S. 991.

The appellants now ask the Court to disregard what the District Court termed "this array of decisions by our highest court" (R. 216).

During the long history of this Court, it has been concerned with the dignity and importance of the individual human being.

Is this such a case?

No. All of the injuries alleged in the complaint are governmental in nature. The alleged discrimination is against "large segments of the population." It involves formulas for the distribution of state tax funds. It concerns the alleged failure of counties "to contribute to their own educational systems". In short, it involves the internal operation of the government of the State of Tennessee.

The question presented is whether the citizens of the State of Tennessee enjoy the republican form of government.

There are no allegations of the violation of any personal rights.

As Mr. Chief Justice White said in *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, the suit is a

> ". . . demand of the state that it establish its right to exist as a state, republican in form." 223 U. S. 150-151.

This proposition cannot be refuted.

In his brief (March, 1961) the Solicitor General uses these phrases:

> ". . . the burden of providing a rational explanation should shift to the state" (p. 69).
>
> ". . . If the state has a reasonable justification. . . ." (p. 69).
>
> ". . . Another possible justification . . . might be. . . ." (p. 70).
>
> ". . . But if the disparity . . . is gross, the burden should be imposed on the state to provide some explanation of the disparity in terms of a valid governmental purpose" (p. 71).

Thus, as Mr. Chief Justice White said, the assault is "on the state as a state."

If the case is a case of the Federal judiciary sitting for the purpose of requiring the State of Tennessee, as a state, to justify its existence, is it not a case where equity should stay its hand?

And the Court is asked to enter this field, this state political field, without any authorization and without any signposts to point the way.

On what basis will the Court enter this governmental wilderness?

The alleged right concerns representation in a state legislative body. The Constitution does not expressly authorize action by the Court. The Fourteenth Amendment does not mention the republican form of government or legislative representation. Congress has not entered the field.

If the government of the United States must enter the field, would it not be conducive to healthy federalism for the people to authorize the step through their elected representatives in Congress? The appellees respectfully suggest that political and governmental issues should be decided in the political forum.

In his initial brief, the Solicitor General says this:

> "... While Congress has the power to act under the Fourteenth Amendment, this remedy is also unrealistic" (p. 15).
>
> "... Congress has the power under Section 5 of the Fourteenth Amendment to pass legislation correcting malapportionment to state legislatures which violate the Amendment" (p. 58).

Is it not more appropriate under our democratic form of government for Congress to enact remedial legislation than for this Court to legislate judicially?

The very nature of the question of what constitutes a republican form of government under Article IV, Section 4, of the Constitution, requires action by Congress. It requires such action because there must be a definition of the republican form of government. It requires such action because this Court cannot determine when there has been a departure from the norm until the norm has been established.

The appellees' insistence that there must be a standard is not argumentative; it is admitted by the Solicitor General. In his brief (March, 1961) he admits that:

> ". . . exact numerical equality of population is . . . impossible. . . ." (p. 67).

> ". . . *at some point* malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment" (p. 16).

At what point does lack of numerical equality become gross discrimination?

An enumeration of the elements suggested by the Solicitor General emphasizes the desolate wilderness he would have this Court enter.

He urges that the Court consider the "disparity between districts"; whether the state affords the people another "reasonable remedy"; whether the disparity between districts has any "reasonable justification"; and the "amount of time since the last apportionment."

How disproportionate must the representation be before there is real "disparity between districts"? How can the Court tell whether the state affords the people another "reasonable remedy" and when a remedy is "reasonable"? Is the ability to amend the state constitution a "reasonable remedy" and, if so, will the Court in each case determine the degree of difficulty in the amending process? How may the Court determine whether the disparity between districts has a "reasonable justification" and when a justification is "reasonable"? Would the reasonableness of the justification depend on the number of cities in the state and the size of those cities or would it depend on the geography of the state? How much time must elapse since the "last apportionment"? Would it be any period beyond

the limit set in the state constitution or would it be not more than five years beyond the constitutional limit?

It is this controversial field that the appellants and the Solicitor General would have the Court enter.

It is precisely this type of situation Mr. Chief Justice Hughes referred to in *Coleman v. Miller*, 307 U. S. 433, 454-455, when he spoke of:

> ". . . the lack of satisfactory criteria for a judicial determination. . . ."

Does not healthy federalism require that Congress settle these difficult and delicate questions? Should the Federal courts bear the responsibility of requiring each state to justify its "right to exist as a state, republican in form" without a yardstick of some type?

On the question of relief, it is evident that what is here sought by the appellants and the Solicitor General is, not a judicial determination of rights, but action by this Court which will result in coercing a state legislature. This proposition is incontrovertible.

In their brief on the merits, the appellants urge that:

> ". . . History has shown that assertion and retention of jurisdiction by a court (federal or state) has provided the necessary spur to legislative consideration . . . and has produced the necessary corrective action. . . ." (pp. 20-21).

In his brief (March, 1961) the Solicitor General says this:

> "Action by the state legislature is even more likely if the federal court . . . reserves action as to the appropriate remedy. A judicial determination that the present mode of apportionment is illegitimate, even

without any remedial implementation, is bound to have a profound effect upon a legislature" (p. 36).

Thus, the appellants and the Solicitor General urge the Court to authorize the District Court to participate in a political stratagem involving the legislative branch of a sovereign state of the Union.

And why do the appellants and the Solicitor General urge this type of action? It is because the constitutional principle of separation of powers prohibits direct action against the legislature and it is sought to circumvent this prohibition by coercive action. In short, this is not the type of case in which judicial relief can be granted.

This Court should repel the suggestion.

It must be remembered that the Union came into being as the result of grants of power from the several sovereign states. It must also be remembered that the Tenth Amendment is still in force and effect.

The concept of healthy federalism requires that the courts of the Union not be used to coerce the legislative branches of the several state governments.

If the citizens of the United States wish to abandon the principle of separation of powers and also our dual system of government, they should do so by the amending process.

CONCLUSION.

The case is before the Court on the merits. Does the complaint state a claim upon which relief can be granted or does it fail to state a claim upon which relief can be granted? The District Court has held that no claim is stated under the Constitution of the United States (R.

220-221). The District Court based its decision upon "this array of decisions" by this Court (R. 216).

The issue is now squarely before this Court.

On the one hand, the appellants and the Solicitor General urge the Court to depart from its precedents and enter the state political arena. The appellees, on the other hand, urge the Court to continue to adhere to sound principles of constitutional law which have not yet been found wanting.

The Court must weigh the alternatives.

The Constitution of Tennessee can be amended. Congress can enact remedial legislation. These are the traditional processes of a democratic government. Is it better to employ these procedures or is it better for this Court to legislate judicially?

If this Court is to enter the field of state legislative apportionment, should it not do so in a case where the violation of personal rights is clear and not theoretical and where there is a possibility of granting relief without coercing a state legislature?

In his latest brief, the Solicitor General states that:

> ". . . This multiplication of national-local relationships reinforces the debilitation of State governments by weakening the State's control over its own policies and its authority over its own political subdivisions" (p. 43).

The appellees urge that nothing could weaken the state's control over its own policies more effectively than for this Court to authorize the District Court to enter a decree holding that the government of the State of Tennessee is operating illegally.

What should this Court say to the citizens of Tennessee?

Surely there can be no better answer than that given by Mr. Justice Douglas in *Williamson v. Lee Optical of Oklahoma*, 348 U. S. 483, when he said:

> ". . . We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U. S. 113, 134, 24 L. Ed. 77, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" 348 U. S. 488.

The appeal should be dismissed.

.....

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.....

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Certificate of Service.

I, Jack Wilson, Assistant Attorney General of Tennessee, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on ..... day of ....., 1961, I served copies of the within Brief for Appellees on Charles

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 6

(Formerly No. 103, October Term, 1960)

CHARLES BAKER, et al.,
Appellant,

vs.

JOE C. CARR, et al.,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AUGUST SCHOLLE, AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, August Scholle respectfully moves for leave to file as *amicus curiae* a brief in the above-entitled cause, and in support of such motion makes the following statement.

1. The above entitled cause involves the legality of a Tennessee legislative reapportionment act (Sections 3-101 —3-107, Tenn. Code Ann.), which act, it is alleged, violates the Tennessee and federal constitutions and particularly

the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and the United States Civil Rights Act.

2. The proposed *amicus curiae*, August Scholle, President of the Michigan AFL-CIO, is the plaintiff and appellant in a similar action on appeal to this Court from the decision of the Michigan Supreme Court, *Scholle v. Hare*, No. 22, October, 1961 Term (formerly No. 581, October, 1960 Term). Scholle has heretofore filed his Jurisdictional Statement and Brief in Opposition to Appellees' Motion to Dismiss or Affirm, together with Reply Brief to Supplemental Brief of Appellees. This Court has not acted upon said Jurisdictional Statement or Motion to Dismiss or Affirm, having neither noted the presence or absence of probable jurisdiction.

3. The mandamus petition in the Scholle case seeks a declaration of judicial invalidity of the 1952 amendments to Article 5, Sections 2 and 4 of the Michigan Constitution, pertaining to state Senate districting, on the basis of their claimed offensiveness to the equal protection and due process clauses of the United States Constitution. It is alleged that the Senate districts, as there permanently fixed, are arbitrarily and discriminatorily drawn. It is alleged that said state constitutional amendments lack *any* ascertainable or rational criteria for the establishment of the districts created. It is alleged that the amendments represent, if anything, perpetual freezing of the unconstitutionally malapportioned districts that existed at the amendments' enactment, and represent neither population, nor political units, nor area, nor any combination of these or other factors. It is alleged that the amendments effect an arbitrary and capricious classification without rational basis, effecting present vote dilution of up to 13-1 and future vote dilution of greater amounts, all contrary to the Fourteenth Amendment.

4. The Michigan case involves some issues in common with the present, Tennessee case, and the determination of this Court in this case may affect the outcome of the Michigan case.

5. The appellant in the Michigan case generally supports the positions advanced by appellants in the Tennessee case, although certain fact distinctions exist, which are argued by appellees in the Michigan case to materially distinguish the two; namely, the challenged Michigan districting is embodied in a state organic act, the Michigan Constitution (rather than in a questioned statute); and there are in Michigan, as allegedly not in Tennessee, arguably available political remedies, such as the initiative and referendum and constitutional convention.

6. August Scholle, proposed *amicus curiae*, seeks by a brief to present to this Court certain legal positions to the end that the judgment of this Court in *Baker v. Carr* (a) will be based upon positions which, if made applicable to similar issues in the Michigan case, will not be prejudicial to the Michigan appellant, and (b) will not be based upon positions which might be dispositive of issues in the Michigan case which are not before the Court in the Tennessee case.

7. While it is submitted that there is a Fourteenth Amendment violation in both the Tennessee and Michigan cases, the Michigan appellant believes that legal arguments will not be adequately presented by the parties touching upon the apportionment issues peculiar to the Michigan case. Particularly is this so insofar as suggestions have been made by the U. S. Solicitor General in the Tennessee case that an apportionment law which might otherwise by hypothesis violate the Fourteenth Amendment might not be judicially vulnerable if there were an

alternative state political remedy available for its repeal, such as an initiative, referendum or constitutional convention procedure; and that gross disparity in district population size, otherwise sufficient to offend the Fourteenth Amendment, might be excused when districting is founded on otherwise "rational" and uniform criteria. The proposed *amicus curiae* vigorously disputes these suggestions.

8. The appellants have consented to the filing of a brief *amicus curiae* by August Scholle, but the appellees have refused consent.

9. The brief which August Scholle requests to file as *amicus curiae* accompanies this motion.

Respectfully submitted,

AUGUST SCHOLLE,
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Dated: September, 1961.

BRIEF OF AUGUST SCHOLLE, AMICUS CURIAE

August Scholle files this brief *amicus curiae* contingent upon the Court's granting the motion for leave to file such brief, heretofore set forth.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the appellant in an apportionment case on appeal to this Court from the Michigan Supreme Court, being *Scholle v. Hare*, October Term, 1961, No. 22. Reference to the motion for leave to file brief *amicus curiae*, *supra*, is respectfully directed.

OPINIONS BELOW

We accept the statement of "Opinions Below" appearing in the brief for the United States as *amicus curiae*.

JURISDICTION

We accept the statement of "Jurisdiction" appearing in the brief for the United States as *amicus curiae*.

QUESTIONS PRESENTED

We accept the statement of "Questions Presented" appearing in the brief for the United States as *amicus curiae*.

STATEMENT

We accept the "Statement" appearing in the brief for the United States as *amicus curiae*.

SUMMARY OF ARGUMENT

This *amicus curiae* generally supports the position of appellants and the United States as *amicus curiae*. (I, Argument, *infra*.)

Certain qualifications, however, as advanced or inferable from the Solicitor General's arguments are questioned.

First, it is submitted—though as to this, the Solicitor General appears not to disagree—that the question of whether gross malapportionment is unconstitutional and subject to judicial correction is not dependent on whether such malapportionment results from state legislative action (or inaction) violative of a state constitution, as distinguished from state constitutional action itself. *Davis v. Schnell* (SD, Ala.), 81 F. Supp. 872, aff'd *per curiam* (1949), 336 U. S. 933 (69 S. Ct. 749, 93 L. ed. 1093); *Cooper v. Aaron*, 358 U. S. 1 (II, Argument, *infra*).

Nor may the right to relief, otherwise available, be denied because of the possibility that the offending law may later be repealed through political action. *Wisconsin v. Illinois*, 281 U. S. 179, 74 L. ed. 99; *Southern Utilities Company v. Palatka*, 268 U. S. 232; *U. S. v. Raines*, 362 U. S. 17, 80 S. Ct. 519, 4 L. ed. 2d 524 (III, Argument, *infra*).

Further, gross population disparity which otherwise violates the Fourteenth Amendment may not be excused because of state constitutional provisions authorizing such disparity, in view of the federal constitution's primacy (IV, Argument, *infra*).

Finally, because malapportionment in its very nature renders impotent the majority of the body politic, relief from its consequences can reasonably only be expected through the courts (V, Argument, *infra*).

ARGUMENT

I. General

In general, we fully support the position of the appellants and, in most respects, the positions urged by the Solicitor General of the United States as *amicus curiae*.

We especially endorse the arguments of appellants and the Solicitor General urging the substantive application of the equal protection and due process clauses to the apportionment area, and the proposed rejection of the "political question doctrine" in such area.

II. Malapportionment is Equally Unconstitutional in State Statutes or Constitutions

We are, however, concerned lest certain arguments, or arguable inferences from such arguments, advanced by the Solicitor General in an apparent effort to narrow the breadth of present decision, influence an untoward and unintended result—to restrict with undue breadth, and unnecessarily so for present purposes, the rights of persons such as the appellant in *Scholle v. Hare* and citizens similarly situated in other states.

For one thing (though we do not in fact understand the appellants or Solicitor General to argue otherwise), it is submitted that the existence of offending malapportionment in a state *statute*, as in *Baker v. Carr*, rather than in a state *constitution*, as in *Scholle v. Hare*, is not significant as a demonstrated *contra*-indication of federal rights violation in the latter instance, notwithstanding the state constitution is violated in the former case and is enforced in the latter. Inasmuch as the basis for alleged infirmity in either instance is a denial of equal protection of the laws and due process of law under the United States Constitution as the supreme law of the land, the form of objectionable state misconduct and its compliance or non-compliance with, or even embodiment in, the *state's* highest law would not be determinative of the existence or absence of *federal* violation.

> "Our people have a right, inalienable and undisputed, to equality of representation. The right is —not to be diluted or diverted. It will succumb neither to the chicanery of the crafty, nor to the apathy of those of our constitutional officers whose failure to act in accordance with its clear mandate accomplishes the 'silent gerrymander'. *Nor, indeed, is the citizens' right vulnerable to the massive power of a majority which disenfranchises through nothing less than amendment of our Constitution itself.' Davis v. Schnell* (SD Ala.), 81 F. Supp. 872, affirmed *per curiam* (1949), 336 U. S. 933 (69 S. Ct. 749, 93 L. ed. 1093), *infra.*" (Dissenting opinion, Mr. Justice Smith below, 360 Mich. 1, at 51 (Jurisdictional Statement, App. A at 51.) (Emphasis added.)

And see *Cooper v. Aaron*, 358 U. S. 1.

III. The Right to Relief Does Not Depend on Possible Political Remedies

An argument made by the Solicitor General with which we must respectfully and vigorously disagree is that the presence of a judicially protected right against malapportionment, *otherwise acknowledged*, may be dependent on the absence of potential political remedies.

Such suggestion, advanced without citational support, is startling and surely erroneous, for it postulates, in effect, that that which is by hypothesis a present denial of equal protection of the laws and/or due process of law will be immune from judicial redress if arguably subject to future repeal by political means. It is an astonishing and erroneous suggestion that that which is otherwise offensive as a denial of constitutional civil rights will be held not to be so, or will be refused judicial correction, because the law might some day be changed.

The necessary and alarming implication of any such doctrine is that the typical civil rights cases, such as those concerning voting rights or segregation, which have been repeatedly and consistently acted upon in recent and earlier years by this Court, would have been decided in contrary fashion if the offending state laws were subject to repeal through the initiatory or other amendatory process. To so hold would abdicate the judicial function and leave those aggrieved, upon facts of *Brown v. Board of Education*, 347 U. S. 483, or *Cooper v. Aaron*, 358 U. S. 1, for example, to theoretical political remedies of the offending states. In a state such as Michigan, for example, which provides the initiative, referendum and constitutional convention amendatory processes, no law however otherwise offensive could ever be judicially attacked under such argu-

ment—not even that hypothesized by Mr. Justice Douglas in *South v. Peters* which would reduce "the vote of Negroes, Catholics and Jews so that each got only one-tenth of a vote."

The startling suggestion that rights otherwise judicially protected are at the mercy of only potential legislative correction is a proposition repeatedly struck down by this Court.

In *Wisconsin v. Illinois*, 281 U. S. 179, 74 L. ed. 799, an original suit in equity in this Court to enjoin water diversion by the sanitary district of Chicago and the State of Illinois, Mr. Justice Holmes wrote for the Court rejecting an argument of proposed delay pending possible congressional modification of the applicable statute:

> "These requirements as between the parties are the constitutional right of those states, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. * * * *The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter.*" (Pp. 197, 198.) (Emphasis added.)

Similarly, in *Southern Utilities Company v. Palatka*, 268 U. S. 232, the Court found no lack of mutuality in a utilities company contract with a city notwithstanding acknowledged residual authority of the legislature to regulate and modify rates and thereby relieve the municipality of its contract obligations.

> "[I]t is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. * * * Such a notion, logically

> carried out, would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain." (P. 233.)

And in *U. S. v. Raines*, 362 U. S. 17, 80 S. Ct. 519, 4 L. ed. 2nd 524, sustaining a Congressional act authorizing suit by the United States Attorney General restraining discriminatory interference with the rights of Negro voters, this Court rejected an argument that relief should not be granted because "the ultimate voice of the State has not spoken, since higher echelons of authority in the state might revise the appellee's action". The Court answered:

> "It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. See *Cooper v. Aaron*, 358 U. S. 1, 16-19. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." (P. 25.)

Rather than looking to alternative *political* remedies to correct infringements of *legal* rights, we commend the following more reasonable, traditional and justifiable approach as suggested, in other context, in the Solicitor General's brief:

> "• • • we submit that this case should be approached, like other cases of an alleged constitutional violation, by ascertaining whether the federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then the question of a remedy should be considered. We do not think the premise can be accepted that the federal courts possess no appropriate remedy whatsoever among the broad and

> flexible equitable powers to prevent a violation of the Fourteenth Amendment from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction." (Pp. 40, 41, Solicitor General's brief.)

This is especially so where affirmative relief may in fact become unnecessary because of legislative deference to judicial declaration (see Solicitor General's brief, pp. 35-36), *and where delicate federal-state comity problems do not exist, as in the Michigan case, where plaintiffs have sought state court adjudication.*

IV. Gross Population Disparity Violates the Fourteenth Amendment, Irrespective of State Constitutional Provisions

We must further respectfully disagree with the suggestion of the Solicitor General that gross disparity in district populations, though otherwise constitutionally offensive under the due process and equal protection clauses, may be excused if some criterion other than population, if rational and if reasonably applied, is used as the basis for apportionment.

(Solicitor General's brief, p. 69: "If the state has a reasonable justification, even a significant disparity should not be unconstitutional.")

We find difficulty in squaring this proposition with the general argument advanced at pp. 60-66 of the Solicitor General's brief, that gross disparity of population which devalues the vote effects as much as infringement upon

voters' Fourteenth Amendment rights as does outright denial of the right to vote or the destruction of ballots cast. For, as there stated correctly by the Solicitor General:

> "[D]iscrimination between residents of a state on the basis of their geographic location is not insulated from the proscriptions of the Fourteenth Amendment."[1]

Why this is so only if the discrimination is occasioned by legislative action (or inaction) inconsistent with a state's constitution, but not if required by state constitutional provisions themselves, we fail to comprehend.

On the contrary, to accept articulated discrimination in an organic (or consistent legislative) act as permissible, while invalidating that which results from legislative action or inaction, is to ignore the premise, earlier developed, that a constitutional infirmity exists, if at all, by reason of *federal* constitutional proscriptions, which, as the supreme law of the land, are equally applicable to state constitutions and statutes.

In short, we believe the doctrine of "one man-one vote" is the basic principle to be necessarily derived from the Fourteenth Amendment and from the voting rights cases, and necessarily to be applied to all states and to all "state action". This is to deny neither the admitted substantial and proper discretion, in practice and application, left to the states in district formulation.

---

[1] The point has been similarly made:

"Any discrimination between racial and geographical discrimination is artificial and unrealistic. Both should be abolished." *Dyer v. Kazuhisa Abe* (D. Hawaii, 1956, 138 F. Supp. 220),

under organic act similar to Tennessee's. Admittedly, the *Dyer* Court in dictum suggests "geographical representation" in a "fundamental law" is permissible.

Such a rule we would hope this Court would here announce.

But at the least, we hope that as a basis for present decision it would not unnecessarily announce the converse, that is, that gross population disparity is irrelevant in the face of state-sanctioned districting on a basis other than population; and the Court might then leave to another case, squarely raising the question, consideration of state constitutions expressly authorizing districting criteria other than population.* Here, unhappily, the present inequality of districts on a population basis violates both the Tennessee and federal constitutions—which is significant to the extent that defendants in such instance may not be heard to contend a rational excuse for their action.

Here, the disparity is inexcusable—and unconstitutional.

V. Relief Can Only Be Expected in the Courts

It is vital that this Court sustain the judicial right to afford relief in instances of gross malapportionment, as in Tennessee. It is unrealistic to suggest or anticipate political correction of such maladies by a sick political system itself— whether by unrepresentative legislatures, constitutional conventions, or otherwise. Reference of the aggrieved to the unjust system of which they complain is almost a cynical disregard of their plight. Representatives of gerrymandered districts may only be expected to continue faithful representation of their distorted constituencies, and not the popular will (see cartoon opposite).

---

* The Michigan provisions remain vulnerable, in any event, as being based on no rational, uniform, or even ascertainable criteria.

"As Your Representative, I Promise To Continue Our Fight Against Redistricting"



The all-pervasive and debilitating influences of malapportionment on the body politic which militate relief, if at all, only through the courts, has been eloquently demonstrated by Dr. William Anderson, Professor Emeritus of Political Science of the University of Minnesota, in a supplemental brief filed in *Magraw v. Donovan* (D. Minn, 1958), 159 F. Supp. 901, 163 F. Supp. 184. His words are so compelling that they bear quotation in substantial measure:

> "[W]hat are the consequences of the failure of the legislature to live up to the state and federal requirements as to equality of voting right and its refusal to accord equal representation to all the people[?]
>
> "The immediate effects are obvious in the legislature itself. There each senator and each representative has one vote, no matter how few or how many people he represents. Committee memberships and committee chairmanships are also distributed among the members without any special regard to the numbers of people they represent. The result is that legislative business is not regularly controlled by representatives of the majority of the people. Instead the members from the less populous districts have an undue influence over all legislative activity. They are conscious of their influnce and their power, and they exercise it. * * * They know, too, how to drive hard bargains on legislative issues and even on constitutional amendments, especially where area claims or county claims are involved as against state wide interests and the urban and suburban interests that represent more people.
>
> "Every observer of the work of the legislature is aware of this general tendency. It would be interesting to go through the history of attempts to bring about the equalization of the property valuations in the state * * * to allocate a larger share of road-user revenues to the counties at the expense of the shares of the state and the urban places, the

ways in which legislative requests from rural areas have been treated as compared with the treatment accorded to requests from urban and suburban places with respect to workmen's compensation, unemployment compensation, public housing, and other urban proposals. To do so, however, would require the weighing of a great deal of evidence of many kinds and that would be very tedious. Competent observers generally are so aware of the tendency toward a sort of one-sidedness, and it is so commonly conceded even by the legislators who are exercising the power that a marshalling of the evidence is hardly worth the effort.

"The effect of this situation upon the representatives from the most populous districts is naturally one of frustration, which sometimes verges on despair. With tens of thousands of constituents to represent, they find themselves unable to achieve as much as the more numerous representatives from the less populous districts. Legislation that they consider to be fair and necessary for their people in crowded urban and suburban districts is too easily blocked by those who represent far fewer people.

"The frustrations of the legislators from the more populous districts are in turn reflected back upon the constituencies, where people have become aware that because of the malapportionment of representation their wishes do not count as much as those of voters in more strategically located and less populous districts. Alert, informed, and interested citizens in the most populous areas who try to improve the legislation and administration of their state and of their local governments frequently encounter an attitude of indifference and even of hostility to their efforts. When they trace the opposition to its sources they find time and again that it centers in legislators from districts of small population that are greatly over-represented in the legislature. They find that they must first get a reappor-

tionment of representation to get a more representative legislature, and when they are blocked time and again in this effort many of them also develop a sense of frustration and 'what's the use?' This is an ominous sign of the loss of confidence in popular government; and when well-informed voters themselves become hopeless and somewhat cynical, who will there be to carry on the struggle for the preservation of American institutions?

"The effects upon the minds of young persons resulting from unethical and unconstitutional practices in high places are also worthy of mention. Anyone who has believed in and tried to convey and explain to young people the principles of popular government and constitutionalism, as I have tried to do for many years, knows what can happen in young minds when practice departs so far from principles and pretensions. Here we come to what may be the most crucial issue of all, that of constitutional morality. In state after state * * * the equal protection principle of the 14th Amendment [is] being flouted or ignored. * * *

"* * * Such failure not only overrides the principle of the equality of men before the law, which is so closely related to the philosophical and religious principle of the equal worth and dignity of every man by nature and before his Maker; it is in addition a deliberate breach of a sort of original compact, of a constitution adopted by the people, in which all agreed to accord to each other equality in legislative representation as well as in all other significant respects.

"This issue of constitutionalism or constitutional morality, of abiding by the constitution, cannot be brushed aside as mere idealism. It lies close to the base of all systems of popular government. These systems rest upon such basic ideas as those of mutual respect and confidence among men, and upon

keeping faith with all men in all things. When this basis is seriously undermined, and no way can be found for a peaceful and lawful correction of wrongs and the restoration of mutual confidence, the resort to force and violence is not unthinkable.

"Another apparent consequence of the failure to accord fair representation to all people within the states is * * * [that t]he loss of confidence in government may be not a total loss of confidence in all governments but only in particular governments. In a federal system such as that of the United States, the well informed citizen constantly compares the work of the different units and levels of government, national, state, and local. He forms his own judgments as to which ones are doing most and best for the public welfare and which ones have the highest standards. In a sense there is an unannounced and unpublicized yet very real and continuing competition among governments for the people's favor and respect. There is reason to believe that in the present century the states have lost ground in this competition against the national government. They lost ground because they were not sufficiently sensitive to the needs of the people. While the people were moving more and more into the urban centers and building up great cities and even greater metropolitan areas, the state legislatures were laggard in their recognition of the legislative and financial needs of such places and the people in them. Many able leaders in urban places attributed this legislative neglect to the continued rural domination over the legislature even after the majority of the people had become dwellers in cities. In any case the leaders of public opinion in the larger cities to a considerable extent gave up expecting sympathetic interest in their problems at the state capitols and turned more and more to Congress and the national administration for constructive help.

"The general result of this new trend was to begin to make subtle but very important changes in the federal system. The old balance of powers and functions between the national and state governments began to be altered and is still being altered in favor of more concentration in Washington. This tendency might have developed to some extent in any event, but real defects in state governments, sharply called to public attention by men like Theodore Roosevelt, Elihu Root, Woodrow Wilson, and other leaders, probably had much to do with the trend. Many, and I think most, of the experienced observers of public affairs in the nation honestly believe that the trend toward minority rule in state legislatures, and the disrespect for the principle of the political equality of all men, exemplified by the failure * * * to reapportion representation as required by * * * the equality principle of the 14th Amendment, lie at the root of this loss of confidence in the states, and help to explain the trend toward Washington. Recent years have seen the states making feverish efforts to regain some of the lost ground, but very few states have done anything to get at the causes of the public's loss of confidence.

"So important has this aspect of the problem become that it is receiving increasing attention on a nationwide scale. The Commission on Intergovernmental Relations established by Congress in 1953, of which I had the honor to be a member, particularly emphasized the need for a return to fair legislative apportionments as an essential step in the rehabilitation of the states. Leading organizations of citizens interested in the improvement of government in the United States, and having nothing to gain for themselves, such as The Assembly of the States, the National Municipal League, and the National League of Women Voters, have put themselves strongly on record to the same effect.

"* * * The national government is dependent upon the states for many things that concern its

own self-preservation and the welfare of the nation as a whole. This is true in the fields of elections, education, public health and welfare, local government, and many other internal public services. To have the legislatures of the states so constituted that they truly represent the people of the state as a whole, and so that the national government can deal with them in all intergovernmental relations with the assurance that they do fairly represent all the people, is a matter of no small concern.

"What the states or any of them do can have very serious effects also on the nation's international relations and its dealings with other countries, and these have recently become increasingly important. Let minority rule in state legislatures, racial and religious discriminations, and other tendencies of recent years develop much further than they have, and the pretensions of this nation to democratic leadership in the world will be seriously compromised, if they have not been so compromised already. The strength and purity of American political institutions may not seem to be seriously endangered as yet, but there are several tendencies, such as the one I have been discussing, and other developments in public morals, that will bear close watching from the point of view of the national interest. * * *"

CONCLUSION

It is respectfully submitted that the appellants in *Baker v. Carr* and the appellants similarly situated elsewhere suffer a gross denial of their constitutional rights under the Fourteenth Amendment which not only justifies, but requires, judicial intervention and protection if relief is to be known at all. This *amicus curiae* accordingly concurs in the relief prayed by the appellants.

Respectfully submitted,

AUGUST SCHOLLE,
Amicus Curiae,
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Dated: September, 1961.

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No. [redacted] 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

CHARLES W. BAKER, ET AL.,
Appellants,

vs.

JOE C. CARR, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE,

AND

BRIEF FOR J. P. HARRIS, PETER MACDONALD, JOHN McCORMALLY, AND ERNEST W. JOHNSON, AS AMICI CURIAE.

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IN THE

SUPREME COURT OF THE UNITED STATES

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Appellants,

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JOE C. CARR, ET AL.,
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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

COME NOW J. P. Harris, Peter Macdonald, John McCormally, and Ernest W. Johnson (Kansas Taxpayers and Qualified Voters) and respectfully move the Court for leave to file a brief in the above-entitled matter as amici curiae, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, and in support thereof allege and state as follows:

1. That the above-entitled case (the "Tennessee Case") was instituted by qualified voters and taxpayers in the State of Tennessee against state election and other officials under the Federal Civil Rights Act and the Federal Declaratory Judgment Act, to invalidate the existing state apportionment statute on grounds that it denies the equality in voting rights guaranteed by the Constitution of Tennessee and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

2. That as citizens of Kansas residing in Reno and Johnson counties, counties which are predominantly urban or metropolitan in population, the Kansas taxpayers are subject to many of the same forms of discrimination in representation and electoral influence as are complained of by the appellants in the Tennessee Case.

3. That the existing apportionment of the Kansas State Senate, duly enacted by the state legislature in 1947, and the existing apportionment of the Kansas State House of Representatives, duly enacted by the state legislature in 1961, did at the respective dates of their enactment and do now violate the provisions of the Kansas Constitution relative to equality of voting rights and of apportionment of districts, and were and are a denial of the Kansas Taxpayers' rights under the equal protection clause of the Fourteenth Amendment of the Federal Constitution, and under the Federal Civil Rights Act, and constitute an abridgment of their right to vote for members of the state legislature within the meaning and scope of Section 2 of the Fourteenth Amendment of the Federal Constitution.

4. That the Kansas Constitution, by providing that each county shall have one representative in the lower house of the legislature, regardless of population, and by further limiting the maximum number of seats in said lower house to such a number in comparison to the total number of counties as to make equal representation of citizens and control of the legislative lower house by a popular majority impossible, violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution and further violates Article IV, Section 4, of the Federal Constitution guaranteeing a republican form of government to each state in the union.

5. That as a result of the aforementioned provisions of the Kansas Constitution and the patently unequal apportionment statutes enacted by the state legislature, the Kansas legislature is manifestly unrepresentative of the state's population and becomes more so by legislative inaction due to the shift in population patterns and the passage of time.

6. That Kansas Taxpayers are in the process of preparing a case challenging the constitutionality of the Kansas apportionment statutes and relative provisions of the Kansas Constitution on the grounds above set forth, but that said action as yet has not been commenced.

7. That the state of voting rights and representation in Kansas involves many of the issues presented to this Court in the Tennessee Case, and the determination and ruling therein may affect the course and result of the efforts of Kansas Taxpayers and others to obtain judicial relief.

8. That Kansas Taxpayers fully support the position and arguments advanced by appellants in the Tennessee Case, and seek by a brief as amici curiae to present to this Court the factual situation and legal issues which will be presented to the Kansas court in the apportionment suit they propose to file, all to the end that the judgment of this Court in the Tennessee Case (a) will be based upon positions not prejudicial to Kansas Taxpayers if applied to similar issues existing in Kansas, (b) will not inferentially decide issues existing in Kansas and not before the Court in the Tennessee Case, and (c) will be decided upon issues of fact and law which will establish a ready basis for relief in securing equal representation and voting rights as guaranteed by the Kansas and Federal Constitutions.

9. That while both Tennessee and Kansas legislatures have failed to apportion either equitably or regularly as provided by constitutional mandate, and thus demonstrating a related interest in the subject matter, the Kansas Taxpayers believe that the facts and questions of law will not be adequately presented by the parties touching upon the reapportionment issues peculiar to the Kansas case, and in particular upon those provisions of the Kansas Constitution preventing equal representation in the state House of Representatives.

10. That the appellants have consented to the filing of a brief by the Kansas Taxpayers as amici curiae but that the appellees have refused consent.

11. That the brief which the Kansas Taxpayers request to file as amici curiae accompanies this motion.

Respectfully submitted,

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IN THE

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF OF FOUR KANSAS TAXPAYERS AND QUALIFIED VOTERS AS AMICI CURIAE

J. P. Harris, Peter Macdonald, John McCormally and Ernest W. Johnson (Kansas Taxpayers and Qualified Voters) file this brief contingent upon the Court's granting the Motion for Leave to File Brief as Amici Curiae in the above appeal from a judgment of the District Court of the United States for the Middle District of Tennessee entered on February 5, 1960, granting a motion to dismiss filed in said cause by appellees.

OPINIONS BELOW.

The opinion of Judge Miller of the District Court of the United States for the Middle District of Tennessee upon convening a three-judge District Court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge District Court (R. 214) is reported at 179 F. Supp. 824 (M.D. Tenn. 1959).

JURISDICTION.

The order of the three-judge District Court dismissing the complaint was entered on February 4, 1960, (R. 220-221). Notice of appeal to this Court was filed on March 29, 1960, (R. 310). Probable jurisdiction was noted on November 21, 1960, (R. 314). The jurisdiction of this Court to review the decision of the court below by direct appeal is conferred by 28 U.S.C. 1253 (62 Stat. 926).

INTEREST OF THE AMICI CURIAE.

The Kansas Taxpayers, who are qualified voters in the State of Kansas, are subjected to many of the same forms of discrimination relative to voting rights and equal representation in the Kansas legislature as are present in the Tennessee Case. Accordingly, the Kansas Taxpayers propose to institute an action in the state court system of Kansas, declaring invalid the existing apportionment acts for legislative districts as violative of state and Federal Constitutions and the Federal Civil Rights Act, declaring invalid those provisions of the Kansas Constitution which prevent equal representation and control by the popular majority in the state House of Representatives as violative of the Federal Constitution and enjoining and re-

straining the Secretary of State of Kansas and the county clerks of the several counties in Kansas from holding future elections to the Kansas legislature under the laws pertaining thereto. Reference is here made to the Motion for Leave to File Brief as Amici Curiae filed by Kansas Taxpayers for additional details with respect to their interest in the above-entitled case.

STATEMENT OF KANSAS CASE AND ARGUMENT.

I. The Kansas Constitutional Formula.

The Kansas Constitution provides that the legislature shall be comprised of a Senate and a House of Representatives, the former being authorized a maximum of 40 members and the latter being authorized a maximum of 125 members. While the Senate membership is proportioned to the total population alone, the House of Representatives is required to admit one member from each county in which at least 250 legal votes were cast at the next preceding general election. There have been 105 counties since 1886, leaving only 20 seats to be apportioned among the more heavily populated counties, and thus making it for practical purposes impossible for a popular majority to ever control the House.

The state Constitution in its Bill of Rights affirms that each citizen is possessed of equal and inalienable natural rights, and that all political power is inherent in the people, each free government being founded on their authority and instituted for their equal protection and benefit.[1] It is further provided therein that no special priv-

[1] Constitution of Kansas, Bill of Rights, Sec. 1 and Sec. 2.

ileges or immunities shall be granted by the legislature, which may not be altered, revoked and repealed by the same body.[2] Suffrage is extended to every citizen of the United States of the age of 21 years and upwards who has resided in Kansas six months next preceding any election, except those under disability, those convicted of a felony, and certain other limited categories.[3] Apportionment of the legislature is required at five-year intervals from and after 1866, based upon the state census of the preceding year.[4] This formula provides and guarantees equality of representation as nearly as is possible, although, as above mentioned, such equality does not and cannot extend to the House of Representatives due to constitutional provisions and restrictions.

II. The History of Apportionment in Kansas.

The history of apportionment in Kansas might better be referred to as the "history of malapportionment in Kansas," for an equally apportioned legislature has in truth never existed since the state's admission to the Union in 1861. While uttering the sounds of a democratic institution and of democratic theory, the legislature has in fact acted on the basis of special interests and special interest groups. Apportionment itself, during those rare occasions when it was noticed, has, in varying degrees at each stage of the state's growth, reflected the existing

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[2] Constitution of Kansas, Bill of Rights, Sec. 2.

[3] Ibid. Art. 5, Sec. 1 and Sec. 2.

[4] Ibid. Art. 10, Sec. 2.

struggle between sectional interests, political parties, and the rural and urbanized population.

The Organic Act which created the Territory of Kansas in 1854 had provided a legislative assembly consisting of a 13-member Council and a 26-member House of Representatives, to be increased to a maximum of 39 in proportion to the increase of qualified voters. It further provided that an apportionment be made, based on the census of qualified voters of the several counties and districts, apportioning both branches of the assembly as nearly equal as practicable and giving to each section of the territory "representation in the ratio of its qualified voters as nearly as may be."[5] Notwithstanding this auspicious beginning as a fledgling republic, the cruel course of history did not fulfill the hopes for equality in representation. The early struggles that gave the name to "Bloody Kansas" are well known, and this struggle extended itself to the practical politics of writing a constitution and perpetuating the power of the winner. After three futile, fraud-filled attempts in which it seemed at first the forces of the South would prevail, the free-state sympathizers were at length successful in convening and dominating a constitutional convention in 1859; and in all candor it must be stated that their success was equally marked by all of the fraud and vicious politics of which they so vehemently accused their opponents.

The two political forces represented among the delegates to the Wyandotte Convention in 1859 were chosen from an electorate nearly evenly divided (54.6% Republican),

[5] Act of Congress, May 30, 1854, Sec. 22, 10 Stat. 284.

but the Republicans won 35, or 67%, of the 52 delegates. Those counties north of the Kaw river went Democratic by 319 votes and the Democrats won 16 of 25 delegates from those counties. The combined Republican majority for delegates from counties south of the Kaw, where the radical free-state Republicans were strongest, on the other hand, was a modest 1,538, but these counties had 26 Republican delegates of the 27 allowed.[6] It must appear to even the most casual observer that this result could only have been obtained by a "careful" apportionment of the variety which Kansans still enjoy.

The result was that the Wyandotte Convention was thoroughly partisan and systematically organized against any possible advantage to either Democrats or slavery. The committees in which partisan advantages were important were loaded decisively with Republicans; i. e., Elections, 5 to 2; Apportionment, 10 to 3; Amendment, 6 to 1; and Corporations and Banking, 10 to 3. Only routine committees were rather fairly balanced between the parties, and the Democrats held only 40 (29%) of the 140 committee posts.[7] With this well-oiled machine, the convention proceeded to adopt the singularly uninspired "Wyandotte Constitution," based largely upon the form of constitution then in use by the older Western states. Nothwithstanding its many shortcomings as a workable basis for a modern state government, however, the drafters did have the foresight to provide that each organized county be guaranteed one representative regardless of

[6] G. R. Gaeddert, The Birth of Kansas (Lawrence, 1940), p. 35.
[7] Ibid. p. 39

population, and to adopt a workable malapportionment of the first state legislature.

The Republican apportionment plan as finally adopted was a crude double gerrymander. Some probably Democratic counties were isolated and under-represented, while others were submerged in multi-county districts with a dominant Republican section, all in contravention of the Constitution which the Convention had just adopted providing at least one representative seat for each county. For example, Democratic Wyandotte and Johnson counties were subordinated to free-state Douglas county, and Jefferson and Jackson counties were attached to Shawnee, containing Topeka, the free-state stronghold.[8] This plan was purportedly based on votes cast. Dissent to this assertion came in the form of a formal resolution of protest by the Democrats in which they stated that the plan met "no known rule of representation," that "population has never been consulted," that its purpose was merely "to meet the necessities of a political party," and that it amounted to "a practical disfranchisement of the small counties unworthy of the convention."[9] The practical result of its adoption, of course, was to extinguish any hope of the election of Democratic United States Senators, then done by the state legislature. On the admission of Kansas to the Union on January 29, 1861, at the peak of the secession movement of the southeastern states, the power to apportion the state legislature had a decisive bearing on national politics because control of

[8] Kansas Constitutional Convention, Proceedings, p. 359; Constitution of Kansas, Art. 10, Sec. 3.

[9] Kansas Constitutional Convention, Proceedings, p. 518.

the legislature carried with it control of the selection of the U. S. Senators and control, eventually, over districting for Congressional seats.

The succeeding history of apportionment in Kansas is largely in the splendid tradition established at the constitutional convention, one malapportionment following another. The only major Senate reapportionments, that is to say, reapportionments in which any substantial changes were made in the boundary lines of districts, occurred in 1862, 1871, 1876, 1881, 1886, 1891, 1933, and 1947. Major House reapportionments occurred in 1862, 1871, 1876, 1881, 1886, 1891, 1897, 1909, and 1959. In both cases those taking place during the nineteenth century were largely for the purpose of providing representation for the newly created western counties and reflected to some extent the sectional rivalries which developed during the westward migration of the peoples. This having been accomplished, the mandate of the state Constitution requiring apportionment every five years was subsequently conveniently ignored, and it is significant to note that neither house has had more than two major apportionments in the twentieth century, and in both cases these involved a relatively small change in the overall apportionment pattern.

A brief glimpse of the result of earlier apportionments suffices to bear out the assertion that even relative equality of representation has never been enjoyed in Kansas since its admission to the Union. In 1881 the State House of Representatives seated 137 members, 12 of them from newly organized counties, and making a total of 12 more

than allowed by the Constitution. Thus illegally constituted, the House passed an apportionment bill which decisively shifted the balance of power in both houses toward the rural and sparsely populated western part of the state. Significantly, the 12 new counties represented contained only 4.6% of the 1880 population. All eastern counties that had two senators either lost the second one entirely or had to share him with another and smaller county. Based on 1880 population data, the new act "equitably" represented in the House 63.7% of the population in 42 of the 80 counties. By "equitable" is meant a population per district between 80 and 120 per cent of the average House district's population. Only 7.7% were over-represented, but 28.6% in 20 of the 80 counties were seriously under-represented.[10] Thus, though not really equitable, this was the last remotely equitable apportionment in the state's history. Those counties containing large cities commenced an accelerated growth in the next decade, while the remaining unsettled lands eligible to become counties were organized rapidly. Inasmuch as the real growth of the cities occurred after the vested offices of the small counties were firmly established, subsequent history has shown that to challenge the distribution is merely to invite frustration.

[10] Page, Legislative Apportionment in Kansas, p. 62.

III. The Present State of Apportionment and Its Effect on Voting Rights.

The most recent reapportionment of the Kansas Senate, and the second such reapportionment during the twentieth century, was passed by the 1947 legislature (G. S. 1949, 4-102). Although a state census is made annually, and was available for use as provided by the constitutional mandate, this seems to have been ignored completely, with the result that the existing act as passed was immediately in violation of the law. The state by the 1947 census had a total population of 1,835,011 people, which would have given an average of 45,875 persons per district to an equally apportioned Senate of 40 seats. The largest county and senate district at that time, Sedgwick, had a population of 203,478, or approximately four and one-half times the average. Wyandotte County with 167,198 persons was more than 3.6 times the average, and Shawnee, with 106,244, was 2.3 times the average size. The smallest senatorial district at that time, the Thirty-first District containing Jewell and Mitchell counties, contained only 20,268 persons, or substantially less than half the average size and only one-tenth the size of Sedgwick County. In all, 19 of the 40 seats were more than 20% less than the average population figure, and three seats were more than 20% in excess of the average. When passed, then, the 1947 act apportioned only 18 of the 40 seats on a more or less equitable basis, if a generous 20% variation either above or below the average is used as the basis for defining "equitable."

The passage of time has seen a steady growth of population in Kansas, and to a marked degree this has represented a rapid growth of urban population, particularly in the present four metropolitan counties. Lacking regular reapportionment as provided by the state Constitution, the result has been a silent gerrymander by inaction, and the discrimination originally written into the act has been allowed to become worse. The 1960 Federal census now gives Kansas a total population of 2,178,611 people, of whom 1,328,741, or 61%, are classified as urban, the term "urban" being defined to include places of 2,500 inhabitants or more, whether incorporated or unincorporated, and the densely settled urban fringes of cities. An average-sized district, using this census, would contain a population of 54,465 persons in each of the 40 districts. However, the changing population pattern in Kansas has been such that only ten of the 40 districts are now within the "equity" range of variation of not more than 20% above or below the average. Six districts are above average and 24 districts are below. The Twenty-seventh District, containing Sedgwick County, for example, had a 1960 population of 343,231 persons, or approximately 6.3 times the average, which should entitle the county to six Senate seats instead of its one. Wyandotte County with a 1960 population of 185,495 is approximately 3.4 times as large as the average, Shawnee County with a 1960 population of 141,286 is 2.6 times larger than average, and Johnson County with a 1960 population of 143,792 people is 2.64 times as large. Each of these counties remains a single district, whereas each would have multiple districts

if apportioned on the basis of population as provided by the state Constitution.

In sharp contrast to the under-representation of the four metropolitan counties and Senate districts in Kansas, is the gross over-representation of the rural districts. For example, of the 24 districts which are below the 20% equity range of variance from average, 12 are more than 50% below the average. The Thirty-first District containing Jewell and Mitchell counties remains the smallest district with a population of only 16,083, or less than one-third the size of the average. The vote of a resident of this district is worth approximately 21.3 times as much as a resident of the Twenty-seventh District (Sedgwick County), and his representation is accordingly an equal amount more influential on his behalf in state politics. In short, in a land of political equality, it would appear that a citizen of Jewell or Mitchell county is 21.3 times "more equal" than his fellow citizen in Sedgwick County in terms of influence in the Kansas Senate. It is interesting to note, also, that even the so-called "average" is not by any means representative, for only nine of the 40 districts equal or exceed the average. The harsh facts are that, based on the 1960 Federal census, 21 of the 40 Senate seats, being the majority necessary to constitute a quorum and to pass any bill or joint resolution, are controlled by 584,840 persons or .2684 of the 1960 population of 2,178,611. Twenty-seven Senate seats, being the two-thirds majority required for Senate approval of any Constitutional amendment or proposed Constitutional convention, are controlled by 842,238 persons or .3866 of the

1960 population. The four largest districts, being comprised of the four metropolitan counties of Johnson, Sedgwick, Shawnee and Wyandotte, have a combined 1960 population of 813,804 people, or .3735 of the total, and have only four votes. These four votes represent nearly the same number of people as do the 27 votes controlling the two-thirds majority of the Kansas Senate.

The Kansas House of Representatives presents a picture of gross discrimination in favor of rural areas which makes the upper chamber appear a model of equality by contrast. Far-sighted planning by the early fathers who guided the destinies of the Wyandotte Convention provided that every county would be assured one seat in the House regardless of population, if only it could muster 250 qualified voters, and at the same time limited the size of the House to 125 seats. With 105 counties, only 20 seats are left to be distributed among the metropolitan and urban counties where the larger proportion of the population is now located. The majority of the people of Kansas, therefore, can never control the House without either (a) a Constitutional revision or amendment which must first be approved by a two-thirds vote of both of the malapportioned houses before submission to the raw masses, or (b) an unforseen rush of the people from the cities back to the farms. If representative of anything at all, the lower house represents land and not people, and the Kansas Taxpayers therefore contend that the restrictive provisions of the state Constitution which guarantee this result are violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution,

and also of Article IV, Section 4, thereof, guaranteeing a republican form of government to each state.

The most recent major reapportionment of the House of Representatives was had in 1959, only fifty years after the last preceding. (G. S. 1959 Supp., 4-103) At that time the 20 extra seats were reshuffled among the more populous and deserving counties on the basis of one of those formulas only politicians can understand. From the dust of the battle 13 counties emerged with the prize, the four metropolitan counties of Johnson, Sedgwick, Shawnee and Wyandotte sharing a total of 11 of the extra seats, and the remainder one each. The relationship to population, however, is difficult to comprehend. Based upon the 1960 Federal census, if each of the 125 House seats were apportioned equitably on the sole basis of population, each would have an average of 18,155 people. On this standard alone and if apportioned equally, Sedgwick County would be entitled to 19 seats, Wyandotte to 10, and Johnson and Shawnee Counties to 8 each. Instead, Sedgwick has 5, Wyandotte 4, and Johnson and Shawnee have 3 each. If representation was on a more equalitarian basis proportioned upon the size of the smallest district, Wallace County with 2,068 people, Sedgwick County would merit 171 seats, Wyandotte 92 seats, Johnson 71 seats, and Shawnee 70 seats. As can be seen, the citizen of Wallace County has a vote which is approximately 35 times more influential than his city cousin residing in Sedgwick County. Such results as those above set forth can obviously not be obtained when only 20 seats are available for distribution; nevertheless, some relation to

numbers of people might be expected as between the fortunate districts sharing the bone. Instead, Barton County with a 1960 population of 32,368 had an average of only 16,184 people represented by its two House seats, while Sedgwick County with 343,231 people had an average of 68,646 persons for its five seats. The remaining multi-district counties showed like disparity in the average representation within the county.

In addition to a discriminatory distribution of the 20 extra seats among the 13 largest counties (all of which are indeed entitled to all the representation they have or more on an average population basis), the 1959 act also malapportioned the districts within each county. The Twenty-first District in Crawford County, for example, has a 1961 population of 11,354 as shown by the county assessor's figures, while the Twenty-second District in the same county has a 1961 population of 25,680, or more than twice the size of the Twenty-first. The Tenth District in Johnson County has an estimated 1961 population of 66,420, while the Eleventh District in the same county has 29,500, or less than one-half the size of the Tenth. The most flagrant of all is Reno County, a county which has enjoyed the control of two House seats since 1881, and the boundaries of whose two districts have remained virtually the same from then till now. When first created, one district had 6,125 people, and the other 6,701 people, or practical equality. But in the eighty years which have elapsed since then, the population has increased and shifted, largely due to the growth of the county's largest city, Hutchinson, so that today the Seventy-fourth

District contains 49,398 people and the Seventy-fifth only 9,718 people. The result is one of the prime examples of a rotten borough in the State of Kansas, and a dilution of the voting power of the urban citizen of the Seventy-fourth District to only one-fifth the value of the vote exercised by his rural neighbor in the Seventy-fifth. By this means the rural representative from the same county can cancel out the vote of the urban district if and when a rural-urban interest conflict might develop, and without causing so much as a ripple on the smooth waters of the constitutionally guaranteed rural dominance of the House.

A reapportionment act passed by the 1961 session of the legislature, and which could have corrected these inequities, did nothing but make minor alterations in the boundaries of the three Shawnee County districts (L. 1961, Ch. 7, Secs. 32, 33, 34). Rendered almost meaningless at best by these constitutional provisions, apportionment of the 20 extra seats in the House has thus nevertheless received its fair share of malapportionment by both intentional action and intentional inaction. Newspaper criticism of this undemocratic state of affairs recently drew forth the statement of one of the representatives, who also holds the position of Speaker of the House, that "most of the excitement over apportionment has been in the newspapers".[11]

Taken as a whole, the Kansas legislature as presently constituted presents a picture of gross mathematical under-representation of the four large Metropolitan counties, that is to say, those counties with an urban population of

[11] The Hutchinson News (Hutchinson, Kansas), June 9, 1961.

over 50,000 and containing over 70% urban population. Among the 25 Urban counties with an urban population between 10,000 and 49,999 and tending to contain less than 40% rural-farm population, there is serious under-representation; while the 8 Mixed counties, or those with an urban population between 5,000 and 9,999 and tending to contain over 30% rural-farm population are slightly over-represented. The remaining 68 Rural counties, those with an urban population under 5,000 and tending to contain less than 50% urban population, are, of course, grossly over-represented. A 1952 study of apportionment in Kansas made by the University of Kansas Bureau of Government Research indicated that only 9 of the 105 counties were at that time within the "equity" limits for their share of seats in both houses, while four counties enjoyed the ambivalent position of being under-represented in the House and over-represented in the Senate. Over-representation was predominantly rural, and in the House to a significant extent western in flavor.[12] This state of affairs has since grown worse, and in the House today, based upon the 1960 Federal census figures, 63 seats, being the majority necessary to enact legislation, are controlled by 402,687 people, or .1815 of the 1960 population, while 84 seats, being the two-thirds majority required for approval of constitutional amendments, are controlled by 745,959 people, or .342 of the 1960 population.

[12] Page, Legislative Apportionment in Kansas, p. 88.

IV. The Practical Effects of Inequality.

It has sometimes been said that if a popular basis lies behind the scheme of representation in American states, it lies behind it by as much as fifty years! The truth of the matter is that control of the political institution of apportionment has become the lever or device whereby to resist change in the composition of legislatures which would adjust them in accordance with the obvious change in the composition of the electorate. Changes in the political sentiments of the people are arrested, the vested rule of the status quo maintained, and a capitalized value is placed on inaction. The continued maintenance of this malapportionment in favor of the rural minority has also carried with it more tangible advantages. Principally, these are of two types: partisan political advantage and discriminatory tax benefits. From the political standpoint it has enabled full use of that renowned political tool, gerrymander, and, indeed, one has perpetuated the other from the days of the Wyandotte Convention to the present. What it has done on the state level is set forth above, but equal advantage has been obtained in the redistricting of Congressional seats.

Aside from the obvious partisan advantages of the prevailing political party, gerrymanders of the Kansas Congressional districts have also tended to be influenced by sectional rivalries and the rural-urban conflict of interest. Two of the practical unwritten rules governing such apportionment have been (a) keep the three largest population centers in separate Congressional districts, and (b) calculate the effect of the apportionment on the

incumbent so as to save the right one.[13] Nevertheless, some Democratic Congressmen have been elected from time to time, probably on individual appeal. In 1941, reduction of the Kansas delegation to six members necessitated a new redistricting. As stated by the February 9, 1941, "Topeka Daily Capital," U. S. Senator Capper's paper, there were "six good Republican Congressmen . . ., it would be a pity to lose any of them." So the lone Democrat, who was able to win in the Wichita district, was redistricted out of his seat by adding his normally Democratic and urban Fifth District to the strongly Republican and rural Fourth District.

Again, in 1961, faced with a further reduction of the delegation to five members, the Kansas legislature chose to add the southwest Kansas District of Democratic Congressman, J. Floyd Breeding, to the predominantly Republican northwest Kansas District, after detaching Breeding's strongest county and giving it to the Fourth District. (Kansas Session Laws, 1961, Ch. 8, Sec. 2) This resulted in a district of over one-half million people (and one-fourth of the people in Kansas), making it one of the largest in the country, all of which it is hoped, will put an end to Mr. Breeding's political career. The incumbent in the former Sixth District, which merged with the former southwest Kansas district, stated to the press with refreshing candor that "we should draw political lines, not just lines on a map."[14] The disparity of population between

[13] Page, Legislative Apportionment in Kansas, p. 51.

[14] The Hutchinson News (Hutchinson, Kansas), March 29, 1961.

the new First (western Kansas) District, with approximately 540,000 people, and the new Fifth District, with approximately 373,000 people, indicates that this divine revelation has been adhered to with religious fervor.

In view of the studied manner in which the malapportioned and unrepresentative state legislature has consistently malapportioned the Congressional district to serve the interests of both partisan and rural needs, there appears to be a question as to whether or not Section 2 of the Fourteenth Amendment to the Federal Constitution has not also been violated. This section provides that representatives shall be apportioned among the several states according to population, but that when the right to vote at any election for "President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged," the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. Presumably, the limitation to males would now be eliminated by virtue of the Nineteenth Amendment. The Kansas Taxpayers submit that the present state of apportionment in both the Congressional districts in Kansas and the state legislature *is* such an abridgment of their right to vote in any election for representatives and for members of the legislature, and thus a violation of Section 2 of the Fourteenth Amendment to the

Federal Constitution. The remedy provided suggests another possible form of relief available for purposes of judicial enforcement.

The second major tangible result of rural over-representation is the control over the power to tax. One of the most serious and pressing of the problems of urban government is the growing inadequacy of the property tax base to support local services. Neither rural nor urban peoples desire to have heavier burdens placed upon their land, but the more elastic of tax sources are monopolized by the state government and there is a reluctance to share these sources with local governmental units. The fiscal problems of the cities compound themselves, and they are finally forced to turn to the state for assistance. It is at this point that rural area legislators are able to exploit their numerical advantage, for they can grant or deny relief in accordance with the solution from which they stand most to gain. They may curtail city expenditures to prevent urban areas from obtaining better treatment than rural areas in the several programs of grants-in-aid or shared taxes going to local governments; or they may enact special legislation to treat a problem, a practice which facilitates rural dominance in tax control. Although forbidden by the state Constitution, special legislation is regularly enacted in Kansas by merely imposing geographical and population limitations under which only one city in the state can qualify. If the legislature does offer a program of general fiscal aid, the rural majority is in a position to exact its own price in the form of a sharing

formula generous to themselves without a need equivalent to that of the cities.

One of the principal examples of the results of rural control over grants-in-aid, has been the efforts of their legislative majority to protect low property tax levies in rural areas and to prevent disorganization of the generally high-cost, low-standard, small rural school districts. Portions of the aid appropriation which subsidize these schools are paid out of the proceeds of beer and general retail sales taxes that bear most heavily on urban areas, and then are inefficiently applied to rural education. In some cases rural counties have systematically under-assessed their property, so that it is still possible to comply with a required minimum mill levy to qualify for state school aid.[15]

The retail sales tax itself is the model for the discrimination regularly practiced. First enacted in 1937 to finance the state's share of the cost of public assistance programs authorized by the Federal Social Security Act of 1935, it was contemplated that direct appropriations of fixed amounts would be made to the welfare program. The uncertainty of yield and the need for help by the counties in meeting welfare costs, prompted a decision to share the residue, after deduction of amounts appropriated, with the counties on an annual basis. Ignoring the question of need, the legislature adopted a formula of distribution for the residue whereby it went to the counties, fifty per cent on the basis of population and fifty per cent on the

[15] Page, Legislative Apportionment in Kansas, p. 140.

basis of "equalized tangible assessed valuation."[16] After the welfare budget is met, the remainder is distributed through the taxing units in the county, including itself, in proportion to their respective total budgeted revennes from the application of the tangible tax rate of each unit to the total tangible assessed valuation for that unit. This tax sharing formula has become a characteristic one in Kansas. The University of Kansas study of the problem indicated that, based on 1950 population and 1948 tangible assessed valuation, metropolitan counties with a then 25.8% of the population and 14.2% of assessed valuation received 20.9% of the 1950 residue; urban counties with a then 30.4% of population and 23.7% of the valuation, received 26.4%; mixed counties with 15.1% of the population and 18.7% of value received 16.7%; and rural counties with a 28.7% of the population and 43.4% of the value, received 36% of the residue—all from an excise tax derived largely from the urban areas and intended to aid with welfare costs experienced largely in the same urban area.[17]

From the foregoing it can be seen that the state sales tax is used, in part, to reduce local taxes on an entirely different tax base—property. There is no logical relationship to relative needs of local governmental units, and the sharing formula is supported by a legislative majority from areas that in no sense bear their relative share of the tax fund so distributed. Economically an inner area transfer payment, politically it amounts to a partial sub-

[16] G. S. 1959 Supp., 79-3021.

[17] Page, Legislative Apportionment in Kansas, p. 141.

sidization of rural local government that approaches an exaction.

A similar formula has been applied to the two and one-half per cent gross receipts tax which Kansas levies on liquor sales. Ninety-seven per cent of the proceeds of this tax are shared with local governments through the so-called "County and City Enforcement Fund," but which is in reality an unrestricted shared tax, not a grant-in-aid for liquor enforcement. This fund is shared quarterly with the counties, fifty per cent on a population basis and fifty per cent on the basis of "equalized tangible assessed taxable valuation." Each county keeps half and distributes the balance to the cities in proportion to population. (G. S. 1959 Supp., 79-4101 and 4108) Many of the counties sharing in this fund have enacted prohibition in accordance with the local-option provisions of the Kansas liquor law, and thus have no liquor stores against whom to "enforce" anything, and little or no liquor-control problem. In sharing liquor revenues, then, the limits placed on distribution of the sales tax residue are by-passed by calling the liquor sales tax a gross receipts tax and by making a shared tax sound like a grant-in-aid for enforcement. Cigarette taxes collected by the state are also split with the counties in a similar manner. Small and usually solvent local government units are thus able to shift their operating costs in part from local property taxes to state collected grants.

Another example of tax discrimination is to be found in the gasoline excise tax. The revenues from this tax, from a ton-mile tax on motor carriers, and from automobiles,

trucks, and drivers' license fees, are constitutionally dedicated for the construction and maintenance of Kansas highways.[18] From the proceeds of this fund $900,000.00 per quarter is distributed to the counties on the basis of 40% to the 105 counties equally, and 60% on the basis of assessed valuation, for construction and maintenance of county roads and bridges. (G. S. 1959 Supp., 68-416) Although earmarked for the one purpose, aid to county road systems makes the counties able to lighten the property tax load and to meet other demands for public funds, and is thus clearly a concealed subsidy or transfer payment of the same nature as the shared sales tax residue. This is all the more apparent when it is realized that some 38% of the vehicle miles traveled for which gasoline taxes are presumably paid are driven on city streets that make up only 5% of the total road mileage in the state. County roads, on the other hand, carry only 19% of the mileage traveled but make up 88% of the road miles.[19]

One further, and perhaps ultimately tragic, example will suffice to indicate the practical import of rural over representation in relation to taxes. In 1951 the Kansas legislature appropriated one million dollars from the sales tax fund to be shared with the counties, fifty per cent on a population basis and fifty per cent on "equalized tangible assessed taxable valuation," and to be used for Civil Defense. The counties were to keep one-half and share the other half with the cities in the county in proportion to each city's population in the total city population in the

[18] Constitution of Kansas, Art. 11, Sec. 10.

[19] Kansas State Highway Fact-Finding Report (Topeka, 1948).

county. If, after July 1, 1952, the county commissioners or city councils had not found some Civil Defense use for this handout, it was to be added to their general funds for expenditure in calendar years 1952 and 1953 in addition to budgeted funds.[20] Needless to say, nearly all of this money went for ordinary domestic uses, and Civil Defense was ignored. No relation to need is apparent in the formula for distribution, but the act does demonstrate the importance to the rural majority in the legislature of measures that reduce tax burdens in rural areas with money not collected there.

V. The Impossibility of Obtaining State Legislative Relief.

Perhaps nothing attests more eloquently to the impossibility and to the futility of expecting relief from the legislature itself, than to contemplate the make-up of its component parts and the studied way it has avoided obeying the constitutional mandate to reapportion either regularly or equitably and in accordance with population. While the changes in House membership would be slight by reason of the constitutional guarantee of one representative per county, a radical change in Senate membership would undoubtedly occur. Rural dominance would be lost or severely curtailed in this chamber, depending upon what imaginative forms of gerrymandered districts were developed, and the threat to partisan interests would be not inconsiderable. It cannot be doubted that the existing districts and their incumbents would for the most part be singularly unenthusiastic about voting themselves

[20] 1951 Session Laws, Ch. 498, Sec. 1.

out of office and out of existence! This truth gives reality to the maxim that no constitutional mandate to the legislature is any better than the legislature itself, and this is particularly true where judicial enforcement is denied.

The Kansas legislature has followed the pattern of its own history, and has steadfastly refused to consider any major reapportionment of the Senate in recent years. When pressed on grounds of democratic principles by the newpapers, the present Speaker pro tem of the Kansas Senate refused to reply or comment, and the Speaker of the House offered only the statement that the newpapers were the only parties excited about apportionment.[21] Democracy is apparently the concern of a limited segment of our population, not including legislators! Generally, the central theme among the legislators is not how to deal with the problem, but how to avoid dealing with it. We thus have gerrymanders by inaction, and a mighty effort to look away the family skeleton from public view by ignoring it.

There were, indeed, early efforts to obtain constitutional reform, principally in the nineteenth century. The only serious attempt in the twentieth century was an intellectual-political movement that flowered and faded from 1911 to 1920. S. A. Kingman, a surviving member of the Wyandotte Convention and an early justice of the Kansas Supreme Court, had urged in 1900 that a new constitutional convention was the only way to correct the serious defects that existed in the systems of taxation and representation. His remark, "This is a government of men, not

[21] The Hutchinson News (Hutchinson Kansas), June 9, 1961.

acres," became the battle cry for the reform movement among liberals of both the Wilson and Bull Moose stripe. Unfortunately, World War I intervened and energies were applied elsewhere. The movement died without accomplishing any tangible result.[22]

More recently, an interesting and fairly conclusive experiment tested the climate of legislative opinion on reapportionment in Kansas. In 1949, a resolution was introduced which called for a comprehensive constitutional amendment to deal with apportionment problems (1949 HCR 8). This proposal dropped the guarantee of one representative per county and the obsolete provisions for counties failing to tally 250 votes. It proposed limits for the variation from average population of all legislative districts: Congressional districts would not vary more than 12%, and state legislative districts could vary between 50% and 200% of their averages. It provided for apportionment by an ex officio commission if the legislature should fail to apportion at required times or by required methods, with the commission subject to injunction and mandamus action. The House Committee on State Affairs requested an explanation from the author of the bill and its legislative sponsor. The proposal was coolly received, and the committee recommended that it not pass.[23] Since then, no further reform has been seriously considered by the legislature.

True constitutional reform by legislative initiative is not, for practical purposes, a possibility in Kansas, be-

[22] Page, Legislative Apportionment in Kansas, p. 67.

[23] Page, Legislative Apportionment in Kansas, p. 68.

cause any constitutional amendment or any constitutional convention must first be approved by a two-thirds majority of each house in the malapportioned legislature.[24] All such efforts have failed in the past, but even if a convention were authorized, it would be chosen in an unrepresentative manner based upon the existing apportionment laws. The Governor has no authority to convene a constitutional convention, and there is no provision in the state Constitution authorizing the people to do so by initiative or referendum.

VI. The Necessity of Federal Judicial Assistance.

It is not our purpose in submitting this brief to undertake a lengthy examination of the legal authorities bearing upon these questions. This has already been done in a most thorough and complete manner by the appellants and other amici curiae, and further additions could only bring repetition. What is hoped is that by presenting the factual basis demanding relief in Kansas, this Court will more clearly understand the far-reaching and vitally important implications of its decision, and will be better prepared to render a judgment which will serve the purposes of human rights and democracy in all of the varying situations to which it will apply. Kansas suffers neither more nor less than its sister states, and although each may vary in terms of the constitutional provision and laws involved, all are identical in the need for reform and realization of equal suffrage and representation.

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[24] Constitution of Kansas, Art. 14, Sec. 1 and Sec. 2.

Today, reapportionment in many of these states, including Kansas, appears to be at an impasse: No reapportionment until parties act responsibly; no hope for responsible parties until an equitable apportionment. Both of our major political parties are equally responsible for this situation, the accident of history having made the Democrats the offender in Tennessee and the Republicans guilty in Kansas. Had the Democrats initially captured control of the Wyandotte Convention in Kansas, it cannot be doubted that they would have as readily used the control over apportionment to their own advantage. The temptation for any partisan, economic, geographic, or other group of our citizens to utilize this powerful lever to their own advantage is a compelling one, and selfish interests are thereby placed above the interests of the people and of democracy. Failure to reapportion regularly must needs raise the question as to whether the consent of the governed is now linked with public policy in state government, and whether government institutions not truly representative of the majority can qualify as a democracy. It has often been said that to frustrate the majority is to invite disorder, and that the only political force more dangerous than an extremist minority is a long-frustrated majority. It is patently obvious that the present condition of apportionment in Kansas and other states is undemocratic and contrary to both the spirit and letter of Federal and state Constitutions guaranteeing a republican form of government and free and equal elections. While there seems little liklihood of physical violence or revolt against the constitutionally established authorities,

there can be no question that the prestige of our country suffers greatly in the eyes of the world and that there is a loss of respect among our own citizenry.

Apportionment itself was designed by the early fathers to insure the equal access of all of our citizens to the processes of a representative democracy, for without the equal participation of all of the people, there is no democracy. There are those who assert that this republic was not intended by its founders to be a popular democracy, and that certain segments of the population are not responsible enough to have an equal say with others. Yet Thomas Jefferson, author of the Declaration of Independence, said that "the will of the people is the only legitimate foundation of any government" and "no government can continue good, but under the control of the people." A republican government is a government of the people and chosen by the people by its very definition. Of it, Thomas Jefferson made the following statement:

> "Every man and every body of men on earth possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the majority is the natural law of every society of men." [Letter to Washington, 1790]
>
> "[What is a republic?] Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition, more or less of this ingredient of the direct action of the citizens." [Letter to J. Taylor, 1816]

"My most earnest wish is to see the republican element of popular control pushed to the maximum of its practicable exercise. I shall then believe that our government may be pure and perpetual." [Letter to I. H. Tiffany, 1816]

"The first principle of republicanism is, that the lex-majoris partis is the fundamental law of every society of individuals of equal rights; to consider the will of the majority enounced by the majority of a single vote as sacred as if unanimous, is the first of all lessons in importance, yet the last which is thoroughly learnt. This law once disregarded, no other remains but that of force, which ends necessarily in military despotism." [Letter to Baron V. Humboldt, 1817]

If, then, we are to realize the promise that our forefathers made to the world, that here was a place where all men lived in freedom and with equal opportunity, we must make the will of the majority the foundation of all our governmental units.

Beyond the failure of the legislature to apportion itself as required by constitutional mandate and democratic theory, there lie a host of practical implications, some of which have been examined previously. Among other things the steady shift of electoral power to urban and suburban areas, and the progressive industrialization of even rural-oriented states such as Kansas, has resulted in urban needs and problems arising which have been too often ignored or neglected by the rural-dominated state legislatures. The result has been an increased tendency of the cities to by-pass state governments and seek assistance directly from the national government. Continuation of this trend

will result in the roles of the states in our Federal system being further subordinated, with serious consequences to our tradition of local self government. Unquestionably, the failure to reapportion regularly has greatly contributed to the atrophy of state governments as policy making bodies. Moreover, at a time when our nation faces dark and powerful forces, which threaten our very existence, a nation devoted to democratic theory is failing its own test.

If we are to reverse the process now stagnating our state legislatures, and by providing for rule of the popular majority insure a responsible and responsive legislative majority, we must take such steps as are necessary to prevent legislative discrimination between citizens in apportionment, and the legislative ability to allow the discrimination to worsen by inaction. The remedies suggest themselves: Narrow the range of discrimination as nearly as practicable, and make it necessary that the legislatures keep apportionment on a current basis as required by the state constitutions. The legislatures themselves, as has been demonstrated, neither observe the mandates nor permit remedial action, for they are the creatures of the malapportionment.

While the Kansas Supreme Court has not as yet been called upon to decide the question, certain of the American jurisdictions have refused judicial relief, passing the problem off as a legislative responsibility which can apparently not be enforced, no matter how grave the wrong. Democracy cannot exist in such a state of affairs, and we submit that the responsibility to guarantee those civil

rights and give credence to constitutional provisions for a republican form of government and equal protection of individual voting rights, is one that this Court rightfully can and should assume. The right of equal suffrage and, thereby, equal representation in the making of our laws is absolute, and deprivation of this right by either deliberate action or by deliberate inaction surely offends not only state constitutional provisions but constitutes a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution, if this clause is held to mean anything at all. The validity of all laws, including apportionment acts, are justiciable issues, and this is particularly so where the boundaries of constitutional authority are exceeded and the sacred rights guaranteed the citizens are denied. The Kansas Taxpayers submit that the right to review both legislative acts and state constitutional provisions, where they appear violative of any provision of the Federal Constitution and abridge the rights of the citizenry, is not only within the authority of the Federal Courts, but constitutes a solemn duty as well.

CONCLUSION.

The Kansas Taxpayers, in conclusion, respectfully request this Court to assume jurisdiction of the issues herein presented, to reverse the court below, and to exercise its equitable discretion and consider the manifest violations of the sacred rights *guaranteed by the* Federal Constitution.

Respectfully submitted,

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APPENDIX A.

United States Constitutional Provisions Involved.

ARTICLE IV, Section 4:

Sec. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (When the Legislature cannot be convened) against domestic Violence.

AMENDMENT 14, Sections 1 and 2:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

APPENDIX B.

Kansas Constitutional Provisions Involved.

BILL OF RIGHTS, Sections 1 and 2:

Sec. 1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

ARTICLE 2, Sections 1, 2, 8 and 13:

Sec. 1. The legislative power of this state shall be vested in a house of representatives and senate.

Sec. 2. The number of representatives and senators shall be regulated by law, but shall never exceed one hundred and twenty-five representatives and forty senators. From and after the adoption of the amendment the house of representatives shall admit one member from each county in which at least two hundred and fifty legal votes were cast at the next preceding general election; and each organized county in which less than two hundred legal votes were cast at the next preceding general election shall be attached to and constitute a part of the representative district of the county lying next adjacent to it on the east.

Sec. 8. A majority of each house shall constitute a quorum. Each house shall establish its own rules; and shall be judge of the elections, returns and qualifications of its own members.

Sec. 13. A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint resolution.

ARTICLE 5, Section 1:

Sec. 1. Every citizen of the United States of the age of twenty-one years and upwards—who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he or she offers to vote, at least thirty days next preceding such election—shall be deemed a qualified elector.

ARTICLE 10, Sections 1 and 2:

Sec. 1. In the future apportionment of the state, each organized county shall have at least one representative; and each county shall be divided into as many districts as it has representatives.

Sec. 2. It shall be the duty of the first legislature to make an apportionment, based upon the census ordered by the last legislative assembly of the territory; and a new apportionment shall be made in the year 1866, and every five years thereafter, based upon the census of the preceding year.

ARTICLE 14, Sections 1 and 2:

Sec. 1. Propositions for the amendment of this constitution may be made by either branch of the legislature; and if two-thirds of all the members elected to each house shall concur therein, such proposed amendments, together with the yeas and nays, shall be entered on the journal; and the secretary of state shall cause the same to be published in at least one newspaper in each county of the state where a newspaper, is published, for three months preceding the next election for representatives, at which time the same shall be submitted to the electors, for their approval or rejection; and if a majority of the electors voting on said amendments, at said election, shall adopt the amendments, the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately; and not more than three propositions to amend shall be submitted at the same election.

Sec. 2. Whenever two-thirds of the members elected to each branch of the legislature shall think it necessary to call a convention to revise, amend or change this constitution, they shall recommend to the electors to vote at the next election of members to the legislature, for or against a convention; and if a majority of all the electors voting at such election shall have voted for a convention, the legislature shall, at the next session, provide for calling the same.

APPENDIX C.

Kansas Statutes Involved.

GENERAL STATUTES OF KANSAS, 1949, Section 4-102 (being Ch. 19, Sec. 1, of the 1947 Session Laws of the State of Kansas)

4-102. 1. The counties of Brown and Doniphan shall constitute the first senatorial district.

2. The counties of Atchison and Jackson shall constitute the second senatorial district.

3. The county of Leavenworth shall constitute the third senatorial district.

4. The county of Wyandotte shall constitute the fourth senatorial district.

5. The counties of Douglas and Jefferson shall constitute the fifth senatorial district.

6. The county of Johnson shall constitute the sixth senatorial district.

7. The counties of Miami and Franklin shall constitute the seventh senatorial district.

8. The counties of Bourbon, Linn and Anderson shall constitute the eighth senatorial district.

9. The county of Crawford shall constitute the ninth senatorial district.

10. The county of Cherokee shall constitute the tenth senatorial district.

11. The county of Labette shall constitute the eleventh senatorial district.

12. The county of Montgomery shall constitute the twelfth senatorial district.

13. The counties of Neosho and Wilson shall constitute the thirteenth senatorial district.

14. The counties of Woodson and Allen shall constitute the fourteenth senatorial district.

15. The counties of Coffey, Osage and Lyon shall constitute the fifteenth senatorial district.

16. The county of Shawnee shall constitute the sixteenth senatorial district.

17. The counties of Pottawatomie and Nemaha shall constitute the seventeenth senatorial district.

18. The counties of Marshall and Washington shall constitute the eighteenth senatorial district.

19. The counties of Riley, Geary and Wabaunsee shall constitute the nineteenth senatorial district.

20. The counties of Dickinson and Clay shall constitute the twentieth senatorial district.

21. The counties of Marion, Chase and Morris shall constitute the twenty-first senatorial district.

22. The counties of Greenwood, Elk and Chautauqua shall constitute the twenty-second senatorial district.

23. The county of Butler shall constitute the twenty-third senatorial district.

24. The counties of Pratt, Harper and Kingman shall constitute the twenty-fourth senatorial district.

25. The county of Cowley shall constitute the twenty-fifth senatorial district.

26. The county of Sumner shall constitute the twenty-sixth senatorial district.

27. The county of Sedgwick shall constitute the twenty-seventh senatorial district.

28. The counties of Harvey and McPherson shall constitute the twenty-eighth senatorial district.

29. The counties of Saline and Ottawa shall constitute the twenty-ninth senatorial district.

30. The counties of Cloud and Republic shall constitute the thirtieth senatorial district.

31. The counties of Jewell and Mitchell shall constitute the thirty-first senatorial district.

32. The counties of Osborne, Lincoln, Russell and Ellsworth shall constitute the thirty-second senatorial district.

33. The counties of Barton, Rice and Stafford shall constitute the thirty-third senatorial district.

34. The county of Reno shall constitute the thirty-fourth senatorial district.

35. The counties of Barber, Kiowa, Comanche, Clark, Meade, Ford and Gray shall constitute the thirty-fifth senatorial district.

36. The counties of Edwards, Ness, Hodgman, Rush, Pawnee and Lane shall constitute the thirty-sixth senatorial district.

37. The counties of Scott, Wichita, Greeley, Hamilton, Kearny, Finney, Haskell, Grant, Stanton, Morton, Stevens and Seward shall constitute the thirty-seventh senatorial district.

38. The counties of Gove, Trego, Ellis, Rooks and Graham shall constitute the thirty-eighth senatorial district.

39. The counties of Sheridan, Decatur, Rawlins, Thomas, Logan, Wallace, Sherman and Cheyenne shall constitute the thirty-ninth senatorial district.

40. The counties of Smith, Phillips and Norton shall constitute the fortieth senatorial district.

GENERAL STATUTES OF KANSAS, 1959 Supp., Section 4-103 (as amended by Ch. 7, Sec. 1 of the 1961 Session Laws of the State of Kansas)

4-103. 1. The county of Doniphan shall constitute the first representative district.

2. The county of Atchison shall constitute the second representative district.

3. The county of Jefferson shall constitute the third representative district.

4. The city of Leavenworth, in the county of Leavenworth, shall constitute the fourth representative district.

5. The townships of Kickapoo, Easton, Alexandria, High Prairie, Delaware, Fairmount, Tonganoxie, Reno, Stranger and Sherman, in the county of Leavenworth, shall constitute the fifth representative district.

6. All of wards 1, 2, and 3 in the city of Kansas City, in the county of Wyandotte, shall constitute the sixth representative district.

7. All of wards 4, 5, 6 and 7 in the city of Kansas City in the county of Wyandotte, shall constitute the seventh representative district.

8. All of the remaining portion of the city of Kansas City, in the county of Wyandotte, shall constitute the eighth representative district.

9. All of the remaining portion of Wyandotte county shall constitute the ninth representative district.

10. All that part of Johnson county lying north of Seventy-fifth street, and east of Shawnee township, shall constitute the tenth representative district.

11. All of Shawnee, Monticello, and Lexington townships, in the county of Johnson, shall constitute the eleventh representative district.

12. All of Oxford, Aubry, Olathe, Springhill, Gardner, and McCamish townships, and that part of Johnson county lying south of Seventh-fifth street east of Shawnee township, and north of Oxford township, in the county of Johnson, shall constitute the twelfth representative district.

13. The first, second and third wards, city of Lawrence, and the townships of Lecompton, Kanawaka, Clinton, Marion, Willow Springs, and all that portion of the township of Wakarusa which lies west of the city limits of the city of Lawrence, and west of a line extending south of Louisiana street, of the city of Lawrence, all in Douglas county, shall constitute the thirteenth representative district.

14. The fourth, fifth and sixth wards of the city of Lawrence, and the townships of Grant, Eudora, Palmyra, and all that portion of Wakarusa township which lies east of the city limits of the city of Lawrence, and east of a line extending south of Louisiana street, of the city of Lawrence, all in the county of Douglas, shall constitute the fourteenth representative district.

15. The county of Franklin shall constitute the fifteenth representative district.

16. The county of Miami shall constitute the sixteenth representative district.

17. The county of Linn shall constitute the seventeenth representative district.

18. The county of Anderson shall constitute the eighteenth representative district.

19. The county of Allen shall constitute the nineteenth representative district.

20. The county of Bourbon shall constitute the twentieth representative district.

21. The townships of Lincoln, Sherman, Washington, Crawford, Grant, Walnut, the city of Girard, and the third and fourth wards of the city of Frontenac, in the county of Crawford, shall constitute the twenty-first representative district.

22. The townships of Osage, Baker, Sheridan and the first and second wards of the city of Frontenac, the city of Pittsburg, in the county of Crawford, shall constitute the twenty-second representative district.

23. The county of Cherokee shall constitute the twenty-third representative district.

24. The county of Labette shall constitute the twenty-fourth representative district.

25. The townships of Sycamore, West Cherry, Cherry, Drum Creek, Liberty, Cherokee and Parker, and the cities of Cherryvale and Coffeyville, of the county of Montgomery, shall constitute the twenty-fifth representative district.

26. The townships of Louisburg, Rutland, Independence, Caney and Fawn Creek, and the cities of Independence and Caney, of the county of Montgomery, shall constitute the twenty-sixth representative district.

27. The county of Neosho shall constitute the twenty-seventh representative district.

28. The county of Wilson shall constitute the twenty-eighth representative district.

29. The county of Woodson shall constitute the twenty-ninth representative district.

30. The county of Coffey shall constitute the thirtieth representative district.

31. The county of Osage shall constitute the thirty-first representative district.

32. The townships of Dover, Grove, Menoken, Mission, Rossville, Silver Lake, Soldier and that portion of the city of Topeka described as follows: Beginning at the west city

limits on the south bank of the Kansas river; thence easterly along the south bank of the Kansas river to the east quarter section line of the southwest quarter of section 30, township 11 south, range 16 east; thence south along said quarter section line to the south line of the right of way of the Chicago, Rock Island & Pacific railroad; thence northwesterly along the south line of said right of way to where the south line of said right of way intersects the west line of Kenwood addition; thence south along said line to the center line of Willow avenue; thence west on the center line of Willow avenue to Washburn avenue; thence southerly along the center line of Washburn avenue to the center line of Sixth avenue; thence westerly along the center line of Sixth avenue to Jewell avenue; thence southerly along the center line of Jewell avenue to the center line of Tenth avenue; thence westerly along the center line of Tenth avenue to the center line of MacVicar avenue; thence southerly along the center line of MacVicar avenue to the center line of Twelfth street; thence westerly along the center line of Twelfth street to the west line of Section 35, township 11 south, range 15 east, which point is the center line of Gage boulevard; thence southerly along the center line of Gage boulevard to the south city limits; thence westerly to the west city limits; thence northerly along the west city limits to the place of beginning in the county of Shawnee, shall constitute the thirty-second representative district.

33. The township of Tecumseh and that portion of the city of Topeka south of the Kansas river described as follows: Beginning at a point where the west line of Kenwood addition intersects the south line of the right of way of the Chicago, Rock Island & Pacific railroad; then easterly along the south line of said right of way to where said line intersects the east line of the southwest quarter of section 30, township 11 south, range 16 east; thence north along said quarter section line to the south bank of the Kansas river; thence easterly, following the meanderings of the south bank of said Kansas river to the east city limits of Topeka extended north; thence southerly along the east city limits to the south line of township 11 south, also the center line of Sixth avenue; thence westerly along the south line of township 11 south to the intersection with Eighth avenue at Locust street; thence westerly along the center line of Eighth avenue to the center line of Jefferson street; thence southerly along the center line of Jefferson street to the center line of Eleventh street; thence westerly alon the center line of Eleventh street to the center line of Kansas avenue; thence southerly along the center line of Kansas avenue to the

center line of Seventeenth street; thence west along the center line of Seventeenth street to the center line of Washburn avenue; thence northerly along the center line of Washburn avenue to the center line of Eleventh street; thence west along the center line of Eleventh street to the center line of Jewell street; thence north along the center line of Jewell street to the center line of Tenth avenue; thence east along the center line of Tenth avenue to the center line of Jewell street; thence northerly along the center line of Jewell street to the center line of Sixth avenue; thence easterly along the center line of Sixth avenue; to the center line of Washburn avenue; thence northerly along Washburn avenue to the center line of Willow avenue; thence east along Willow avenue to the west line of Kenwood addition; thence northerly along the west line of Kenwood addition to the point of beginning, and all that portion of the city of Topeka that lies north of the Kansas river, in the county of Shawnee, shall constitute the thirty-third representative district.

34. The townships of Auburn, Monmouth, Topeka, Williamsport, and that portion of the city of Topeka described as follows: Beginning at the southwest corner of section 35, township 11 south, range 15 east, which point is the center line of Twelfth street on Gage boulevard; thence easterly along the center line of Twelfth street to the center line of MacVicar avenue; thence northerly along the center line of MacVicar avenue to the center line of Tenth avenue; thence easterly along the center line of Tenth avenue to the center line of Jewell avenue; thence southerly along the center line of Jewell avenue to the center line of Eleventh street; thence easterly along the center line of Eleventh street to the center line of Washburn avenue; thence southerly along the center line of Washburn avenue to the center line of Seventeenth street; thence easterly along Seventeenth street to the center line of Kansas avenue; thence northerly on the center line of Kansas avenue to the center line of Eleventh street; thence easterly along the center line of Eleventh street to the center line of Jefferson street; thence northerly along center line of Jefferson street to the center line of Eighth avenue; thence easterly along the center line of Eighth avenue to the center line of Locust street, at this point Eighth avenue and Tenth avenue become Tenth avenue and the center line of Tenth avenue is the south line of township 11 south; thence easterly along the south line of township 11 south to the east city limits; thence southerly to the south city limits; thence westerly to the center line of Gage boulevard; thence northerly along the center line of

Gage boulevard to the point of beginning in the county of Shawnee, shall constitute the thirty-fourth representative district.

35. The county of Jackson shall constitute the thirty-fifth representative district.

36. The county of Brown shall constitute the thirty-sixth representative district.

37. The county of Nemaha shall constitute the thirty-seventh representative district.

38. The county of Marshall shall constitute the thirty-eighth representative district.

39. The county of Pottawatomie shall constitute the thirty-ninth representative district.

40. The county of Riley shall constitute the fortieth representative district.

41. The county of Geary shall constitute the forty-first representative district.

42. The county of Wabaunsee shall constitute the forty-second representative district.

43. The county of Lyon shall constitute the forty-third representative district.

44. The county of Greenwood shall constitute the forty-fourth representative district.

45. The county of Elk shall constitute the forty-fifth representative district.

46. The county of Chautauqua shall constitute the forty-sixth representative district.

47. The townships of Beaver, Pleasant Valley, Liberty, Dexter, Cedar, Grant, Spring Creek, Silver Dale, Creswell, Bolton, and the city of Arkansas City, in the county of Cowley, shall constitute the forty-seventh representative district.

48. The townships of Maple, Rock, Richland, Omnia, Harvey, Windsor, Otter, Silver Creek, Sheridan Tisdale, Walnut, Vernon, Ninnescah, Fairview, and the city of Winfield, in the county of Cowley, shall constitute the forty-eighth representative district.

49. The townships of Fairmount, Clifford, Lincoln, Sycamore, Chelsea, Prospect, Rosalia, El Dorado, Towanda, Fairview, Plum Grove, Milton, Murdock, and the city of El

Dorado, in the county of Butler, shall constitute the forty-ninth representative district.

50. The townships of Union, Clay, Rock Creek, Douglass, Richland, Pleasant, Walnut, Bloomington, Logan, Hickory, Glencoe, Little Walnut, Spring, Augusta, Bruno, Benton and the city of Augusta, in the county of Butler, shall constitute the fiftieth representative district.

51. The county of Chase shall constitute the fifty-first representative district.

52. The county of Marion shall constitute the fifty-second representative district.

53. The county of Morris shall constitute the fifty-third representative district.

54. The county of Dickinson shall constitute the fifty-fourth representative district.

55. The county of Clay shall constitute the fifty-fifth representative district.

56. The county of Washington shall constitute the fifty-sixth representative district.

57. The county of Republic shall constitute the fifty-seventh representative district.

58. The county of Cloud shall constitute the fifty-eighth representative district.

59. The county of Ottawa shall constitute the fifty-ninth representative district.

60. The townships of Dayton, Cambria, Solomon, Greeley, Eureka, Smolan, Walnut, Gypsum, Liberty, and Smoky View, and all that portion of the city of Salina lying east of a line described as follows: Beginning at the point where the center line of Fifth street intersects the north limit of the city of Salina, thence south along the said center line of Fifth street to the center line of Otis avenue; thence west along the said center line of Otis avenue to the center line of Santa Fe avenue; thence south along the said center line of Santa Fe avenue to the center line of Iron avenue; thence west along the said center line of Iron avenue to the center line of Twelfth street; thence south along the said center line of Twelfth street to the center line of South street, thence east along the said center line of South street to the center line of Santa Fe avenue; thence south along the said center line of Santa Fe avenue to the center line of Prescott avenue; thence west along the said center line of Prescott

avenue to the center line of Ninth street; thence south along the said center line of Ninth street to the south limit of the city of Salina, in the county of Saline, shall constitute the sixtieth representative district.

61. The townships of Elm Creek, Pleasant Valley, Glendale, Smoky Hill, Ohio, North Spring Creek, Washington, South Spring Creek, Falun, and Summit, and all that portion of the city of Salina lying west of a line described as follows: Beginning at the point where the center line of Fifth street intersects the north limit of the city of Salina; thence south along the said center line of Fifth street to the center line of Otis avenue; thence west along the said center line of Otis avenue to the center line of Santa Fe avenue; thence south along the said center line of Santa Fe avenue to the center line of Iron avenue; thence west along the said center line of Iron avenue to the center line of Twelfth street; thence south along the said center line of Twelfth street to the center line of South street; thence east along the said center line of South street to the center line of Santa Fe avenue; thence south along the said center line of Santa Fe avenue to the center line of Prescott avenue; thence west along the said center line of Prescott avenue to the center line of Ninth street; thence south along the said center line of Ninth street to the south limit of the city of Salina, in the county of Saline, shall constitute the sixty-first representative district.

62. The county of McPherson shall constitute the sixty-second representative district.

63. The county of Harvey shall constitute the sixty-third representative district.

64. An area now known as ward 1 and ward 2 in the city of Wichita, which is described as follows: Beginning at the center of the intersection of Douglas and Hydraulic avenue; thence south on the center line of Hydraulic avenue to the city limits of the city of Wichita; thence west to the center of the Big Arkansas river; thence northwesterly along the center line of the Big Arkansas river to the junction of the Big Arkansas river with the Little Arkansas river; thence northerly along the center line of the Little Arkansas river to the north city limits of the city of Wichita; thence east along the north city limits of the city of Wichita to the center of Hydraulic avenue; thence south to the center of the intersection of Hydraulic and Central; thence west along the center line of Central avenue to the center of the intersection of Central and Main streets; thence south along center of Main street to the center of the intersection of Main and Douglas;

thence east along the center line of Douglas avenue to the point of beginning in the county of Sedgwick, shall constitute the sixty-fourth representative district.

65. An area comprising the present ward 3 and ward 4 in the city of Wichita, which is described as follows: Commencing at the center of the intersection of Main and Douglas avenue; thence east along the center line of Douglas avenue to the city limits; thence north and westerly along the city limits of the city of Wichita to the center of Hydraulic street and the north city limits; thence south along the center of Hydraulic street to the center of the intersection of Hydraulic and Central; thence west along center line of Central to center of intersection of Main and Central; thence south along center line of Main street to the point of beginning, in the county of Sedgwick, shall constitute the sixty-fifth representative district.

66. An area now known as ward 5 in the city of Wichita, which is described as follows: Commencing at the south city limits of the city of Wichita and the Big Arkansas river; thence northwesterly along the center line of the Big Arkansas river to the junction of the Big Arkansas river with the Little Arkansas river; thence northerly along the center line of the Little Arkansas river to the north city limits of the city of Wichita; thence westerly, southerly and easterly following the city limits of the city of Wichita to the point of beginning, in the county of Sedgwick, shall constitute the sixty-sixth representative district.

67. An area now known as ward 6 in the city of Wichita, which is described as follows: Commencing at the center of the intersection of Douglas and Hydraulic avenue; thence south along the center line of Hydraulic to the south city limits; thence easterly, northerly, westerly, and southerly following the city boundaries of the city of Wichita to the center of the intersection of Woodlawn and Douglas; thence west along the center line of Douglas avenue to the point of beginning, in the county of Sedgwick, shall constitute the sixty-seventh representative district.

68. That the area of Sedgwick county lying outside the city limits of the city of Wichita shall constitute the sixty-eighth representative district.

69. The county of Sumner shall constitute the sixty-ninth representative district.

70. The county of Harper shall constitute the seventieth representative district.

71. The county of Kingman shall constitute the seventy-first representative district.

72. The county of Barber shall constitute the seventy-second representative district.

73. The county of Pratt shall constitute the seventy-third representative district.

74. All the city of Hutchinson and the townships of Albion, Castleton, Clay, Haven, Lincoln, Reno, Sumner, Ninnescah, Valley, and Yoder, in Reno county, shall constitute the seventy-fourth representative district.

75. All the city of Nickerson and the townships of Arlington, Bell, Center, Enterprise, Grant, Grove, Hayes, Huntsville, Langdon, Little River, Loda, Medford, Medora, Miami, North Hayes, Plevna, Roscoe, Salt Creek, Sylvia, Troy, Walnut and Westminister, in Reno county, shall constitute the seventy-fifth representative district.

76. The county of Stafford shall constitute the seventy-sixth representative district.

77. The city of Great Bend and Great Bend township, in the county of Barton, shall constitute the seventy-seventh representative district.

78. All of Barton county, except the portion thereof lying in the city of Great Bend and in the township of Great Bend, shall constitute the seventy-eighth representative district.

79. The county of Rice shall constitute the seventy-ninth representative district.

80. The county of Ellsworth shall constitute the eightieth representative district.

81. The county of Russell shall constitute the eighty-first representative district.

82. The county of Lincoln shall constitute the eighty-second representative district.

83. The county of Mitchell shall constitute the eighty-third representative district.

84. The county of Osborne shall constitute the eighty-fourth representative district.

85. The county of Jewell shall constitute the eighty-fifth representative district.

86. The county of Smith shall constitute the eighty-sixth representative district.

87. The county of Phillips shall constitute the eighty-seventh representative district.

88. The county of Rooks shall constitute the eighty-eighth representative district.

89. The county of Ellis shall constitute the eighty-ninth representative district.

90. The county of Rush shall constitute the ninetieth representative district.

91. The county of Pawnee shall constitute the ninety-first representative district.

92. The county of Edwards shall constitute the ninety-second representative district.

93. The county of Kiowa shall constitute the ninety-third representative district.

94. The county of Comanche shall constitute the ninety-fourth representative district.

95. The county of Clark shall constitute the ninety-fifth representative district.

96. The county of Ford shall constitute the ninety-sixth representative district.

97. The county of Hodgeman shall constitute the ninety-seventh representative district.

98. The county of Ness shall constitute the ninety-eighth representative district.

99. The county of Trego shall constitute the ninety-ninth representative district.

100. The county of Graham shall constitute the one hundredth representative district.

101. The county of Norton shall constitute the one hundred and first representative district.

102. The county of Decatur shall constitute the one hundred and second representative district.

103. The county of Sheridan shall constitute the one hundred and third representative district.

104. The county of Gove shall constitute the one hundred and fourth representative district.

105. The county of Thomas shall constitute the one hundred and fifth representative district.

106. The county of Rawlins shall constitute the one hundred and sixth representative district.

107. The county of Cheyenne shall constitute the one hundred and seventh representative district.

108. The county of Sherman shall constitute the one hundred and eighth representative district.

109. The county of Logan shall constitute the one hundred and ninth representative district.

110. The county of Wallace shall constitute the one hundred and tenth representative district.

111. The county of Wichita shall constitute the one hundred and eleventh representative district.

112. The county of Greeley shall constitute the one hundred and twelfth representative district.

113. The county of Scott shall constitute the one hundred and thirteenth representative district.

114. The county of Lane shall constitute the one hundred and fourteenth representative district.

115. The county of Finney shall constitute the one hundred and fifteenth representative district.

116. The county of Kearny shall constitute the one hundred and sixteenth representative district.

117. The county of Hamilton shall constitute the one hundred and seventeenth representative district.

118. The county of Grant shall constitute the one hundred and eighteenth representative district.

119. The county of Stanton shall constitute the one hundred and nineteenth representative district.

120. The county of Gray shall constitute the one hundred and twentieth representative district.

121. The county of Haskell shall constitute the one hundred and twenty-first representative district.

122. The county of Meade shall constitute the one hundred and twenty-second representative district.

123. The county of Seward shall constitute the one hundred and twenty-third representative district.

124. The county of Stevens shall constitute the one hundred and twenty-fourth representative district.

125. The county of Morton shall constitute the one hundred and twenty-fifth representative district.

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. | On Appeal From the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Mr. Justice Brennan delivered the opinion of the Court.

This civil action was brought under 42 U. S. C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties,[1] "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court convened under 28 U. S. C. § 2281 in the Middle District of Tennessee.[2] The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F. Supp. 824. We noted probable jurisdiction of the appeal. 364 U. S. 898.[3] We hold that the dismissal was error, and remand the cause to the Dis-

[1] Public Acts of Tennessee, c. 122 (1901), now Tenn. Code Ann. §§ 3–101 to 3–107. The full text of the 1901 Act as amended appears in an Appendix to this opinion.

[2] The three-judge court was convened pursuant to the order of a single district judge, who, after he had reviewed certain decisions of this Court and found them distinguishable in features "that may ultimately prove to be significant," held that the complaint was not so obviously without merit that he would be justified in refusing to convene a three-judge court. 175 F. Supp. 649, 652.

[3] We heard argument first at the 1960 Term and again at this Term when the case was set over for reargument. 366 U. S. 907.

trict Court for trial and further proceedings consistent with this opinion.

The General Assembly of Tennessee consists of the Senate with 33 members and the House of Representatives with 99 members. The Tennessee Constitution provides in Art. II as follows:

> "Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.
>
> "Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.
>
> "Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.
>
> "Sec. 6. Apportionment of senators.—The number of Senators, shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members of the House of Representatives, shall be made up to such county or

counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

Thus, Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications.[4] Decennial reapportionment

[4] A county having less than, but at least two-thirds of, the population required to choose a Representative is allocated one Representative. See also Tenn. Const., Art. II, § 6. A common and much more substantial departure from the number-of-voters or total-population standard is the guaranty of at least one seat to each county. See, *e. g.*, Kansas Const., Art. 2, § 2; N. J. Const., Art. 4, § 3, ¶ 1.

While the Tennessee Constitution speaks of the number of "qualified voters," the exhibits attached to the complaint use figures based on the number of persons 21 years of age and over. This basis seems to have been employed by the General Assembly in apportioning legislative seats from the outset. The 1870 statute providing for the first enumeration, Acts of 1870 (1st Sess.) c. 107, directed the courts of the several counties to select a Commissioner to enumerate "all the male inhabitants of their respective counties, who are twenty-one years of age and upward, who shall be resident citizens of their counties on the first day of January 1871; . . ." Reports compiled in the several counties on this basis were submitted to the General Assembly by the Secretary of State and were used in the first apportionment. Appendix to Tenn. S. J., 1871, 41, 43. Yet such figures would not reflect the numbers of persons qualified to exercise the franchise under the then-governing qualifications: (a) citizenship; (b) residence in the State 12 months, and in the county six months; (c) payment of poll taxes for the preceding year unless entitled to exemption. Acts of 1870 (2d Sess.) c. 10. (These qualifications continued at least until after 1901. See Tenn. Code Ann., §§ 1167, 1220 (1896; Supp. 1904).) Still, when the General Assembly directed the Secretary of State to do all he could to obtain complete reports from the counties, the Resolution spoke broadly of "the impossibility of . . . [redistricting] without the census returns of the voting population from each county . . . ." Tenn. S. J., 1871, pp. 46, 47, 96. The figures also showed a correlation with Federal Census figures for 1870. The Census reported 259,016 male citizens 21 and upward in Tennessee. Ninth Census of

in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. The 1871 apportionment[5] was preceded by an 1870 statute requiring an enumeration.[6] The 1881 apportionment involved three statutes, the first authorizing an enumeration, the second enlarging the Senate from 25 to 33 members and the House from 75 to 99 members, and the third apportioning the membership of both Houses.[7] In 1891 there was both an enumeration and an apportion-

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the United States, 1870, Statistics of the Population 635 (1872). The Tennessee Secretary of State's Report, with 15 counties not reported, gave a figure of 237,431. Using the numbers of actual votes in the last gubernatorial election for those 15 counties, the Secretary arrived at a total of 250,025. Appendix to Tenn. S. J., 1871, 41–43. This and subsequent history indicate continued reference to Census figures and finally in 1901, abandonment of a state enumeration in favor of the use of Census figures. See notes 7, 8, 9, *infra*. See also Williams, Legislative Apportionment in Tennessee, 20 Tenn. L. Rev. 235, 236, n. 6. It would therefore appear that unless there is a contrary showing at the trial, appellants' current figures, taken from the United States Census Reports, are apposite.

[5] Acts of 1871 (1st Sess.), c. 146.

[6] Acts of 1870 (1st Sess.), c. 107.

[7] The statute authorizing the enumeration was Acts of 1881 (1st Sess.), c. 124. The enumeration commissioners in the counties were allowed "access to the U. S. Census Reports of the enumeration of 1880, on file in the offices of the County Court Clerks of the State, and a reference to said reports by said commissioners shall be legitimate as an auxiliary in the enumeration required . . . ." *Ibid.*, § 4.

The United States Census reported 330,305 male citizens 21 and upward in Tennessee. The Tenth Census of the United States, 1880, Compendium 596 (1883). The Tennessee Secretary of State's Report gave a figure of 343,817, Tenn. H. J. (1st Extra Sess.), 1881, 12–14 (1882).

The General Assembly was enlarged in accordance with the constitutional mandate since the State's population had passed 1,500,000. Acts of 1881 (1st Extra Sess.), c. 5; and see, *id.*, Res. No. 3; see also Tenth Census of the United States, 1880, Statistics of the Population 77 (1881). The statute apportioning the General Assembly was Acts of 1881 (1st Extra Sess.), c. 6.

ment.[8] In 1901 the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census and passed the Apportionment Act here in controversy.[9] In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.[10]

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote.[11] The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are

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[8] Acts of 1891, c. 22; Acts of 1891 (Extra Sess.), c. 10. Reference to United States Census figures was allowed just as in 1881, see *supra*, n. 7. The United States Census reported 402,476 males 21 and over in Tennessee. The Eleventh Census of the United States, 1890, Population (Part I) 781 (1895). The Tennessee Secretary of State's Report gave a figure of 399,575. I Tenn. S. J. 473–474 (1891).

[9] Acts of 1901, Sen. Jt. Res. No. 35; Acts of 1901, c. 122. The Joint Resolution said: "The Federal census of 1900 has been very recently taken and by reference to said Federal census an accurate enumeration of the qualified voters of the respective counties of the State of Tennessee can be ascertained and thereby save the expense of an actual enumeration . . . ."

[10] For the history of legislative apportionment in Tennessee, including attempts made since 1901, see Tenn. S. J. 1959, pp. 909–930; and "A Documented Survey of Legislative Apportionment in Tennessee, 1870–1957," which is attached as exhibit 2 to the intervening complaint of Mayor West of Nashville, both prepared by the Tennessee State Historian, Dr. Robert H. White. Examples of preliminary steps are: In 1911, the Senate called upon the Redistricting Committee to make an enumeration of qualified voters and to use the Federal Census of 1910 as the basis. Acts of 1911, S. J. Res. No. 60, p. 315. Similarly, in 1961, the Senate called for appointment of a select committee to make an enumeration of qualified voters. Acts of 1961, S. J. Res. No. 47. In 1955, the Senate called for a study of reapportionment. Tenn. S. J. 224 (1955); but see *id.*, at 1403. Similarly, in 1961, the House directed the State Legislative Council to study methods of reapportionment. Acts of 1961, H. J. Res. No. 65.

[11] Twelfth Census of the United States, 1900, Population (Part 1) 39 (1901); (Part 2) 202 (1902).

eligible to vote.[12] The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, "made no apportionment of Representatives and Senators in accordance with the constitutional formula . . . , but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever."[13] It is further alleged that "because of the population changes since 1900, and the failure of the legislature to reapportion itself since 1901," the 1901 statute became "unconstitutional and obsolete." Appellants also argue that, because of the composition of the legislature effected by the 1901 apportionment act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible.[14] The complaint concludes that "these plain-

[12] United States Census of Population: 1960, General Population Characteristics—Tennessee, Table 16 (1961).

[13] In the words of one of the intervening complaints, the apportionment was "wholly arbitrary, . . . and, indeed, based upon no lawfully pertinent factor whatever."

[14] The appellants claim that no General Assembly constituted according to the 1901 Act will submit reapportionment proposals either to the people or to a Constitutional Convention. There is no provision for popular initiative in Tennessee. Amendments proposed in the Senate or House must first be approved by a majority of all members of each House and again by two-thirds of the members in the General Assembly next chosen. The proposals are then submitted to the people at the next general election in which a Governor is to be chosen. Alternatively, the legislature may submit to the people at any general election the question of calling a convention to consider specified proposals. Such as are adopted at a convention do not, however, become effective unless approved by a majority of the

tiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by

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qualified voters voting separately on each proposed change or amendment at an election fixed by the convention. Conventions shall not be held oftener than once in six years. Tenn. Const., Art. XI, § 3. Acts of 1951, c. 130, § 3, and Acts of 1957, c. 340, § 3, provided that delegates to the 1953 and 1959 conventions were to be chosen from the counties and floterial districts just as are members of the State House of Representatives. The General Assembly's call for a 1953 Constitutional Convention originally contained a provision "relating to the appointment [*sic*] of Representatives and Senators" but this was excised. Tenn. H. J., 1951, p. 784. A Resolution introduced at the 1959 Constitutional Convention and reported unfavorably by the Rules Committee of the Convention was as follows:

"By Mr. Chambliss (of Hamilton County), Resolution No. 12—Relative to Convention considering reapportionment, which is as follows:

"WHEREAS, there is a rumor that this Limited Convention has been called for the purpose of postponing for six years a Convention that would make a decision as to reapportionment; and

"WHEREAS, there is pending in the United States Courts in Tennessee a suit under which parties are seeking, through decree, to compel reapportionment; and

"WHEREAS, it is said that this Limited Convention, which was called for limited consideration, is yet a Constitutional Convention within the language of the Constitution as to Constitutional Conventions, forbidding frequent Conventions in the last sentence of Article Eleven, Section 3, second paragraph, more often than each six years, to-wit:

"'No such Convention shall be held oftener than once in six years.'

"NOW, THEREFORE, BE IT RESOLVED, That it is the consensus of opinion of the members of this Convention that since this is a Limited Convention as hereinbefore set forth another Convention could be had if it did not deal with the matters submitted to this Limited Convention.

"BE IT FURTHER RESOLVED, That it is the consensus of opinion of this Convention that a Convention should be called by the General Assembly for the purpose of considering reapportionment in order that a possibility of Court enforcement being forced on the

virtue of the debasement of their votes." [*] They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray

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Sovereign State of Tennessee by the Courts of the National Government may be avoided.

"BE IT FURTHER RESOLVED, That this Convention be adjourned for two years to meet again at the same time set forth in the statute providing for this Convention, and that it is the consensus of opinion of this body that it is within the power of the next General Assembly of Tennessee to broaden the powers of this Convention and to authorize and empower this Convention to consider a proper amendment to the Constitution that will provide, when submitted to the electorate, a method of reapportionment." Tenn. Constitutional Convention of 1959, The Journal and Debates, 35, 278.

[16] It is clear that appellants' federal constitutional claims rest exclusively on alleged violation of the Fourteenth Amendment. Their primary claim is that the 1901 statute violates the Equal Protection Clause of that amendment. There are allegations invoking the Due Process Clause but from the argument and the exhibits it appears that the Due Process Clause argument is directed at certain tax statutes. Insofar as the claim involves the validity of those statutes under the Due Process Clause we find it unnecessary to decide its merits. And if the allegations regarding the tax statutes are designed as the framework for proofs as to the effects of the allegedly discriminatory apportionment, we need not rely upon them to support our holding that the complaint states a federal constitutional claim of violation of the Equal Protection Clause. Whether, when the issue to be decided is one of the constitutional adequacy of this particular apportionment, taxation arguments and exhibits as now presented add anything, or whether they could add anything however presented, is for the District Court in the first instance to decide.

The complaint, in addition to the claims under the Federal Constitution, also alleges rights, and the General Assembly's duties, under the Tennessee Constitution. Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth

that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large. They also pray for such other and further relief as may be appropriate.

I.

The District Court's Opinion and Order of Dismissal.

Because we deal with this case on appeal from an order of dismissal granted on appellees' motions, precise identification of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellees' grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, ..."

In the setting of a case such as this, the recited grounds embrace two possible reasons for dismissal:

First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;

Second: That, although the matter is cognizable and facts are alleged which establish infringement of appel-

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Amendment. Lastly, we need not assess the legal significance, in reaching our conclusion, of the statements of the complaint that the apportionment effected today under the 1901 Act is "contrary to the philosophy of government in the United States and all Anglo-Saxon jurisprudence. . . ."

lants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

We treat the first ground of dismissal as "lack of jurisdiction of the subject matter." The second we consider to result in a failure to state a justiciable cause of action.

The District Court's dismissal order recited that it was issued in conformity with the court's *per curiam* opinion. The opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds. After noting that the plaintiffs challenged the existing legislative apportionment in Tennessee under the Due Process and Equal Protection Clauses, and summarizing the supporting allegations and the relief requested, the court stated that

> "the action is presently before the Court upon the defendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court." 179 F. Supp., at 826.

The court proceeded to explain its action as turning on the case's presenting a "question of the distribution of political strength for legislative purposes." For,

> "from a review of [numerous Supreme Court] . . . decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject

matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment." 179 F. Supp., at 826.

The court went on to express doubts as to the feasibility of the various possible remedies sought by the plaintiffs. 179 F. Supp., at 827–828. Then it made clear that its dismissal reflected a view not of doubt that violation of constitutional rights was alleged, but of a court's impotence to correct that violation:

"With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress." 179 F. Supp., at 828.

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes.[10] Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

[10] We need not reach the question of indispensable parties because the District Court has not yet decided it.

II.

Jurisdiction of the Subject Matter.

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration—what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion, see pp. 22–49, *infra*, that this cause presents no nonjusticiable "political question" settles the only possible doubt that it is a case or controversy. Under the present heading of "Jurisdiction of the Subject Matter" we hold only that the matter set forth in the complaint does arise under the Constitution and is within 28 U. S. C. § 1343.

Article III, § 2 of the Federal Constitution provides that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ." It is clear that the cause of action is one which "arises under" the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants

of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 579, or "frivolous," *Bell* v. *Hood*, 327 U. S. 678, 683.[11] That the claim is unsubstantial must be "very plain." *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 274. Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter. And of course no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. We said in an earlier voting case from Tennessee: "It is obvious . . . that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States." *Swafford* v. *Templeton*, 185 U. S. 487, 493. "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U. S. 678, 682. See also *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305–308.

[11] The accuracy of calling even such dismissals "jurisdictional" was questioned in *Bell* v. *Hood*. See 327 U. S., at 683.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U. S. C. § 1343 (3):

> "The district courts shall have original jurisdiction of any civil action authorized by law [18] to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." [19]

An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature. The first cases involved the redistricting of States for the purpose of electing Representatives to the Federal Congress. When the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, § 4, of the Federal Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction "in view . . . of the

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[18] 42 U. S. C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[19] This Court has frequently sustained District Court jurisdiction under 28 U. S. C. § 1343 (3) or its predecessors to entertain suits to redress deprivations of rights secured against state infringement by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Douglas* v. *Jeannette*, 319 U. S. 157; *Stefanelli* v. *Minard*, 342 U. S. 117; cf. *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Snowden* v. *Hughes*, 321 U. S. 1; *Smith* v. *Allwright*, 321 U. S. 649; *Monroe* v. *Pape*, 365 U. S. 167; *Egan* v. *Aurora*, 365 U. S. 514.

subject-matter of the controversy and the Federal characteristics which inhere in it . . . ." *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 570. When the Minnesota Supreme Court affirmed the dismissal of a suit to enjoin the Secretary of State of Minnesota from acting under Minnesota redistricting legislation, we reviewed the constitutional merits of the legislation and reversed the State Supreme Court. *Smiley* v. *Holm*, 285 U. S. 355. And see companion cases from the New York Court of Appeals and the Missouri Supreme Court, *Koenig* v. *Flynn*, 285 U. S. 375; *Carroll* v. *Becker*, 285 U. S. 380. When a three-judge District Court, exercising jurisdiction under the predecessor of 28 U. S. C. § 1343 (3), permanently enjoined officers of the State of Mississippi from conducting an election of Representatives under a Mississippi redistricting act, we reviewed the federal questions on the merits and reversed the District Court. *Wood* v. *Broom*, 287 U. S. 1, reversing, 1 F. Supp. 134. A similar decree of a District Court, exercising jurisdiction under the same statute, concerning a Kentucky redistricting act, was reviewed and the decree reversed. *Mahan* v. *Hume*, 287 U. S. 575, reversing, 1 F. Supp. 142.[20]

The appellees refer to *Colegrove* v. *Green*, 328 U. S. 549, as authority that the District Court lacked jurisdiction of the subject matter. Appellees misconceive the holding of that case. The holding was precisely contrary to their reading of it. Seven members of the Court participated in the decision. Unlike many other cases in this field which have assumed without discussion that there was jurisdiction, all three opinions filed in *Colegrove* discussed the question. Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter. MR. JUSTICE

[20] Since that case was not brought to the Court until after the election had been held, the Court cited not only *Wood* v. *Broom*, but also directed dismissal for mootness, citing *Brownlow* v. *Schwartz*, 261 U. S. 216.

BLACK joined by MR. JUSTICE DOUGLAS and Mr. Justice Murphy stated: "It is my judgment that the District Court had jurisdiction . . . ," citing the predecessor of 28 U. S. C. § 1343 (3), and *Bell* v. *Hood*, *supra*. 328 U. S., at 568. Mr. Justice Rutledge, writing separately, expressed agreement with this conclusion. 328 U. S., at 564, 565, n. 2. Indeed, it is even questionable that the opinion of MR. JUSTICE FRANKFURTER, joined by Justices Reed and Burton, doubted jurisdiction of the subject matter. Such doubt would have been inconsistent with the professed willingness to turn the decision on either the majority or concurring views in *Wood* v. *Broom*, *supra*. 328 U. S., at 551.

Several subsequent cases similar to *Colegrove* have been decided by the Court in summary *per curiam* statements. None was dismissed for want of jurisdiction of the subject matter. *Cook* v. *Fortson*, 329 U. S. 675; *Turman* v. *Duckworth*, *ibid.*; *Colegrove* v. *Barrett*, 330 U. S. 804;[21] *Tedesco* v. *Board of Supervisors*, 339 U. S. 940; *Remmey* v. *Smith*, 342 U. S. 916; *Cox* v. *Peters*, 342 U. S. 936; *Anderson* v. *Jordan*, 343 U. S. 912; *Kidd* v. *McCanless*, 352 U. S. 920; *Radford* v. *Gary*, 352 U. S. 991; *Hartsfield* v. *Sloan*, 357 U. S. 916; *Matthews* v. *Handley*, 361 U. S. 127.[22]

Two cases decided with opinions after *Colegrove* likewise plainly imply that the subject matter of this suit is within District Court jurisdiction. In *MacDougall* v. *Green*, 335 U. S. 281, the District Court dismissed for want of jurisdiction, which had been invoked under 28

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[21] Compare *Boeing Aircraft Co.* v. *King County*, 330 U. S. 803 ("the appeal is dismissed for want of jurisdiction"). See *Coleman* v. *Miller*, 307 U. S. 433, 440.

[22] *Matthews* did affirm a judgment that may be read as a dismissal for want of jurisdiction, 179 F. Supp. 470. However, the motion to affirm also rested on the ground of failure to state a claim upon which relief could be granted. Cf. text following, on *MacDougall* v. *Green*. And see text, p. 49.

U. S. C. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit. In *South* v. *Peters*, 339 U. S. 276, we affirmed the dismissal of an attack on the Georgia "county unit" system but founded our action on a ground that plainly would not have been reached if the lower court lacked jurisdiction of the subject matter, which allegedy existed under 28 U. S. C. § 1343 (3). The express words of our holding were that "federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S., at 277.

We hold that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint.

III.

STANDING.

A federal court cannot "pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

The complaint was filed by residents of Davidson, Hamilton, Knox, Montgomery, and Shelby Counties. Each is a person allegedly qualified to vote for members of the General Assembly representing his county.[23] These appellants sued "on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated . . . ."[24] The appellees are the Tennessee Secretary of State, Attorney General, Coordinator of Elections, and members of the State Board of Elections; the members of the State Board are sued in their own right and also as representatives of the County Election Commissioners whom they appoint.[25]

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[23] The Mayor of Nashville suing "on behalf of himself and all residents of the City of Nashville, Davidson County, . . ." and the Cities of Chattanooga (Hamilton County) and Knoxville (Knox County), each suing on behalf of its residents, were permitted to intervene as parties plaintiff. Since they press the same claims as do the initial plaintiffs, we find it unnecessary to decide whether the intervenors would have standing to maintain this action in their asserted representative capacities.

[24] The complaint also contains an averment that the appellants sue "on their own behalf and *on behalf of all other voters* in the State of Tennessee." (Emphasis added.) This may be read to assert a claim that voters in counties allegedly over-represented in the General Assembly also have standing to complain. But it is not necessary to decide that question in this case.

[25] The duties of the respective appellees are alleged to be as follows:

"Defendant, *Joe C. Carr*, is the duly elected, qualified and acting Secretary of State of the State of Tennessee, with his office in Nashville in said State, and as such he is charged with the duty of furnishing blanks, envelopes and information slips to the County Election Commissioners, certifying the results of elections and maintaining the records thereof; and he is further ex officio charged, together with the Governor and the Attorney General, with the duty of examining the election returns received from the County Election Commissioners and declaring the election results, by the applicable provisions of the Tennessee Code Annotated, and by Chapter 164 of the Acts of 1949, inter alia.

"Defendant, *George F. McCanless*, is the duly appointed and acting Attorney General of the State of Tennessee, with his office in

We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion. Many of the cases have assumed rather than

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Nashville in said State, and is charged with the duty of advising the officers of the State upon the law, and is made by Section 23–1107 of the Tennessee Code Annotated a necessary party defendant in any declaratory judgment action where the constitutionality of statutes of the State of Tennessee is attacked, and he is ex-officio charged, together with the Governor and the Secretary of State, with the duty of declaring the election results, under Section 2–140 of the Tennessee Code Annotated.

"Defendant, *Jerry McDonald*, is the duly appointed Coordinator of Elections in the State of Tennessee, with his office in Nashville, Tennessee, and as such official, is charged with the duties set forth in the public law enacted by the 1959 General Assembly of Tennessee creating said office.

"Defendants, *Dr. Sam Coward*, *James Alexander*, and *Hubert Brooks* are the duly appointed and qualified members constituting the State Board of Elections, and as such they are charged with the duty of appointing the Election Commissioners for all the counties of the State of Tennessee, the organization and supervision of the biennial elections as provided by the Statutes of Tennessee, Chapter 9 of Title 2 of the Tennessee Code Annotated, Sections 2-901, et seq.

"That this action is brought against the aforenamed defendants in their representative capacities, and that said Election Commissioners are sued also as representatives of all of the County Election Commissioners in the State of Tennessee, such persons being so numerous as to make it impracticable to bring them all before the court; that there is a common question of law involved, namely, the constitutionality of Tennessee laws set forth in the Tennessee Code Annotated, Section 3–101 through Section 3–109, inclusive; that common relief is sought against all members of said Election Commissions in their official capacities, it being the duties of the aforesaid County Election Commissioners, within their respective jurisdictions, to appoint the judges of elections, to maintain the registry of qualified voters of said County, certify the results of elections held in said County to the defendants State Board of Elections and Secretary of State, and of preparing ballots and taking other steps to prepare for and hold elections in said Counties by virtue of Sections 2–1201, et seq. of Tennessee Code Annotated, and Section 2–301, et seq. of Tennessee Code Annotated, and Chapter 164 of the Acts of 1949, inter alia."

The question whether the named defendants are sufficient parties remains open for consideration on remand.

articulated the premise in deciding the merits of similar claims." And *Colegrove* v. *Green*, *supra*, squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.[27] A number of cases decided after *Colegrove* recognized the standing of the voters there involved to bring those actions.[28]

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly

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[26] *Smiley* v. *Holm*, *supra* ("'citizen, elector and taxpayer' of the State"); *Koenig* v. *Flynn*, *supra* ("'citizens and voters' of the State"); *Wood* v. *Broom*, *supra* ("citizen of Mississippi, a qualified elector under its laws, and also qualified to be a candidate for election as representative in Congress"); cf. *Carroll* v. *Becker*, *supra* (candidate for office).

[27] Mr. Justice Rutledge was of the view that any question of standing was settled in *Smiley* v. *Holm*, *supra*; Mr. Justice Black stated "that appellants had standing to sue, since the facts alleged show that they have been injured as individuals." He relied on *Coleman* v. *Miller*, 307 U. S. 433, 438, 467. See 328 U. S. 864, 868.

Commentators have suggested that the following statement in Mr. Justice Frankfurter's opinion might imply a view that appellants there had no standing: "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." 328 U. S., at 552. See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1298 (1961); Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1081–1083 (1958). But since the opinion goes on to consider the merits, it seems that this statement was not intended to intimate any view that the plaintiffs in that action lacked standing. Nor do the cases cited immediately after the above quotation deal with standing. See especially *Lane* v. *Wilson*, 307 U. S. 268, 272–273.

[28] *MacDougall* v. *Green*, *supra* ("the 'Progressive Party,' its nominees for United States Senator, Presidential Electors, and State offices, and several Illinois voters"); *South* v. *Peters*, *supra* ("residents of the most populous county in the State"); *Radford* v. *Gary*, *supra* ("citizen of Oklahoma and resident and voter in the most populous county"); *Matthews* v. *Handley*, *supra* ("citizen of the State"); see also *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221; *Leser* v. *Garnett*, 258 U. S. 130; *Coleman* v. *Miller*, 307 U. S. 433, 437–446.

situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States* v. *Classic*, 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States* v. *Mosley*, 238 U. S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold*, 100 U. S. 371; *United States* v. *Saylor*, 322 U. S. 385.

It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman* v. *Miller*, 307 U. S., at 438, not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law . . . ." *Fairchild* v. *Hughes*, 258 U. S. 126, 129; compare *Leser* v. *Garnett*, 258 U. S. 130. They are entitled to a hearing and to the District Court's decision on their claims. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 163.

IV.

JUSTICIABILITY.

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove* v. *Green*, *supra*, and subsequent *per curiam* cases.[29] The court stated: "From a review of these decisions there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." 179 F. Supp., at 826. We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." The cited cases do not hold the contrary.

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." *Nixon* v. *Herndon*, 273 U. S. 536, 540. Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government,[30] and that complaints based on that clause have been held to present political questions which are nonjusticiable.

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[29] *Cook* v. *Fortson*, 329 U. S. 675; *Turman* v. *Duckworth*, *ibid.*; *Colegrove* v. *Barrett*, 330 U. S. 804; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276; *Remmey* v. *Smith*, 342 U. S. 916; *Anderson* v. *Jordan*, 343 U. S. 912; *Kidd* v. *McCanless*, 352 U. S. 920; *Radford* v. *Gary*, 352 U. S. 991.

[30] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U. S. Const., Art. IV, § 4.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove* v. *Green* and other decisions of this Court on which it relied. Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden* v. *Hughes*, 321 U. S. 1, 11. To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts. That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

We have said that "in determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also

the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman* v. *Miller*, 307 U. S. 433, 454–455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political questions.[21] Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature;[22] but many such questions uniquely demand single-voiced statement of the Government's views.[23] Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis

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[21] *E. g.*, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

[22] See *Doe* v. *Braden*, 57 U. S. (16 How.) 635, 657; *Taylor* v. *Morton*, Fed. Cas. No. 13,799 (C. C. D. Mass.) (Mr. Justice Curtis), affirmed, 67 U. S. (2 Black) 481.

[23] See *Doe* v. *Braden*, 57 U. S. (16 How.) 635, 657.

of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. Compare *Terlinden* v. *Ames*, 184 U. S. 270, 285, with *Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 21 U. S. (8 Wheat.) 464, 492–495.[34] Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. Compare *Whitney* v. *Robertson*, 124 U. S. 190, with *Kolovrat* v. *Oregon*, 366 U. S. 187.

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," [35] and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory,[36] once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.[37] Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking,

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[34] And see *Clark* v. *Allen*, 331 U. S. 503.

[35] *United States* v. *Klintock*, 18 U. S. (5 Wheat.) 144, 149; see also *United States* v. *Palmer*, 16 U. S. (3 Wheat.) 610, 634–635.

[36] *Foster & Elam* v. *Neilson*, 27 U. S. (2 Pet.) 253, 307; and see *Williams* v. *Suffolk Insurance Co.*, 38 U. S. (13 Pet.) 415, 420.

[37] *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380; *De Lima* v. *Bidwell*, 182 U. S. 1, 180–200.

for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. *The Three Friends*, 166 U. S. 1, 63, 66. Still again, though it is the executive that determines a person's status as representative of a foreign government, *Ex parte Hitz*, 111 U. S. 766, the executive's statements will be construed where necessary to determine the court's jurisdiction, *In re Baiz*, 135 U. S. 403. Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments. Compare *Ex parte Peru*, 318 U. S. 578, with *Mexico* v. *Hoffman*, 324 U. S. 30, 34–35.

Dates of duration of hostilities: Though it has been stated broadly that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires," *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 57, here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands "a prompt and unhesitating obedience," *Martin* v. *Mott*, 25 U. S. (12 Wheat.) 19, 30 (calling up of militia). Moreover, "the cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency. *Stewart* v. *Kahn*, 11 Wall. 493, 507." *Fleming* v. *Mohawk Wrecking Co.*, 331 U. S. 111, 116. But deference rests on reason, not habit.[38] The question in a particular case may not seriously implicate considerations of finality—*e. g.*, a public program of importance

[38] See, *e. g.*, *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426.

(rent control) yet not central to the emergency effort.[39] Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away: "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended." *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547–548.[40] Compare *Woods* v. *Miller Co.*, 333 U. S. 138. On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending. *The Protector*, 79 U. S. (12 Wall.) 700.

Validity of enactments: In *Coleman* v. *Miller*, *supra*, this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.[41] Similar considerations apply to the enacting process: "the respect due to coequal and independent departments," and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. *Field* v. *Clark*, 143 U. S. 649, 672, 676–677; see *Leser* v. *Garnett*, 258 U. S. 130, 137. But it is not true that courts will never delve into a legislature's records upon such a quest: If the enrolled statute lacks an effective date, a court will not

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[39] Contrast *Martin* v. *Mott*, *supra*.

[40] But cf. *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184, 187.

[41] Cf. *Dillon* v. *Gloss*, 256 U. S. 368. See also *United States* v. *Sprague*, 282 U. S. 716, 732.

hesitate to seek it in the legislative journals in order to preserve the enactment. *Gardner* v. *The Collector*, 73 U. S. (6 Wall.) 499. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

The status of Indian tribes. This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions,[42] *United States* v. *Holliday*, 70 U. S. (3 Wall.) 407, 419, also has a unique element in that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . [The Indians are] domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *The Cherokee Nation* v. *Georgia*, 30 U. S. (5 Pet.) 1, 16, 17.[43] Yet, here too, there is no blanket rule.

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[42] See also *Fellows* v. *Blacksmith*, 60 U. S. (19 How.) 366, 372; *United States* v. *Old Settlers*, 148 U. S. 427, 466; and compare *Doe* v. *Braden*, 57 U. S. (16 How.) 635, 657.

[43] This case, so frequently cited for the broad proposition that the status of an Indian tribe is a matter for the political departments, is in fact a noteworthy example of the limited and precise impact of a political question. The Cherokees brought an original suit in this Court to enjoin Georgia's assertion of jurisdiction over Cherokee territory and abolition of Cherokee government and laws. Unquestionably the case lay at the vortex of most fiery political embroilment. See 1 Warren, The Supreme Court in United States History (Rev. ed.), 729–779. But in spite of some broader language in separate opinions, all that the Court held was that it possessed no original jurisdiction over the suit: for the Cherokees could in no view be considered either a State of this Union or a "foreign state." Chief Justice Marshall treated the question as one of *de novo* interpretation of words in the Constitution. The Chief Justice did say that "the acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts," but here he referred to their existence "as a state, as a distinct political society, separated from others, . . ." From there he went to "a question of much more difficulty . . . . Do the Cherokees constitute a foreign state in the sense of the constitution?" *Id.*, at 16. Thus, while the Court

While "'It is for [Congress] . . . , and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage,' . . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . ." *United States* v. *Sandoval*, 231 U. S. 28, 46. Able to discern what is "distinctly Indian," *ibid.*, the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

It is apparent that several formulations which vary slightly according to the settings in which the questions

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referred to "the political" for the decision whether the tribe was an entity, a separate polity, it held that whether being an entity the tribe had such status as to be entitled to sue originally was a judicially soluble issue: criteria were discoverable in relevant phrases of the Constitution and in the common understanding of the times. As to this issue, the Court was not hampered by problems of the management of unusual evidence or of possible interference with a congressional program. Moreover, Chief Justice Marshall's dictum that "it savours too much of the exercise of political power to be within the proper province of the judicial department," *id.*, at 20, was not addressed to the issue of the Cherokees' status to sue, but rather to the breadth of the claim asserted and the impropriety of the relief sought. Compare *Georgia* v. *Stanton*, 73 U. S. (6 Wall.) 50, 77. The Chief Justice made clear that if the issue of the Cherokees' rights arose in a customary legal context, "a proper case with proper parties," it would be justiciable. Thus, when the same dispute produced a case properly brought, in which the right asserted was one of protection under federal treaties and laws from conflicting state law, and the relief sought was the voiding of a conviction under that state law, the Court did void the conviction. *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515. There, the fact that the tribe was a separate polity served as a datum contributing to the result, and despite the consequences in a heated federal-state controversy and the opposition of the other branches of the National Government, the judicial power acted to reverse the State Supreme Court. An example of similar isolation of a political question in the decision of a case is *Luther* v. *Borden*, 48 U. S. (7 How.) 1; see *infra*.

arise may describe a political question, although each has one or more elements which identifies it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. In particular, we

shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: Luther v. *Borden*, 48 U. S. (7 How.) 1, though in form simply an action for damages for trespass was, as Daniel Webster said in opening the argument for the defense, "an unusual case." [44] The defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," 48 U. S., at 34, which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government.[45] The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

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[44] 48 U. S., at 29. And see 11 The Writings and Speeches of Daniel Webster 217 (1903).

[45] See Mowry, The Dorr War (1901), and its exhaustive bibliography. And for an account of circumstances surrounding the decision here, see 2 Warren, The Supreme Court in United States History (Rev. ed.), 185–195.

Dorr himself, head of one of the two groups and held in a Rhode Island jail under a conviction for treason, had earlier sought a decision from the Supreme Court that his was the lawful government. His application for original habeas corpus in the Supreme Court was denied because the federal courts then lacked authority to issue habeas for a prisoner held under a state court sentence. *Ex parte Dorr*, 44 U. S. (3 How.) 103.

Chief Justice Taney's opinion for the Court reasoned as follows: (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that "the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals."[46] There was, of course, no room for application of any doctrine of *de facto* status to uphold prior acts of an officer not authorized *de jure*, for such would have defeated the plaintiff's very action. A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.

(2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that "it rested with the political power to decide whether the charter government had been displaced or not," and that that department had acknowledged no change.[47]

(3) Since "the question relates, altogether, to the constitution and laws of [the] . . . State," the courts of the United States had to follow the state courts' decisions unless there was a federal constitutional ground for overturning them.

(4) No provision of the Constitution could be or had been invoked for this purpose except Art. IV, § 4, the Guaranty Clause. Having already noted the absence of standards whereby the choice between governments could be made by a court acting independently, Chief Justice

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[46] 48 U. S., at 39.

[47] *Ibid.*

Taney now found further textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the Judiciary:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and . . . Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

"So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. . . . [B]y the act of February 28, 1795, [Congress] provided, that, 'in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.'

"By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . .

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. . . .

"It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; . . . [C]ertainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; . . . In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. . . ." 48 U. S., at 42–44.

Clearly, several factors were thought by the Court in *Luther* to make the question there "political": the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.[48]

[48] Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforce-

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has

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ment a political question, the Court plainly implied that the political question barrier was no absolute: "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it." 48 U. S., at 45. Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of "republican form," and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented.

That was not the only occasion on which this Court indicated that lack of criteria does not obliterate the Guaranty's extreme limits: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." *Minor* v. *Happersett*, 88 U. S. (21 Wall.) 162, 175–176. There, the question was whether a government republican in form could deny the vote to women.

In re Duncan, 139 U. S. 449, upheld a murder conviction against a claim that the relevant codes had been invalidly enacted. The Court there said:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for

since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. See *Taylor & Marshall* v. *Beckham* (*No. 1*), 178 U. S. 548 (claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held nonjusticiable); *Pacific States Tel. Co.* v. *Oregon*, 223 U. S. 118 (claim that initiative and referendum negated republican government held nonjusticiable); *Kiernan* v. *Portland*, 223 U. S. 151 (claim that municipal charter amendment *per* municipal initiative and referendum negated republican government held nonjusticiable); *Marshall* v. *Dye*, 231 U. S. 250 (claim that Indiana's constitutional amendment procedure negated republican government held nonjusticiable); *O'Neill* v. *Leamer*, 239 U. S. 244 (claim that delegation to court of power to form drainage districts negated republican government held, "futile"); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565 (claim that invalidation of state reapportionment statute *per* referendum negates republican government held nonjusticiable);[48] *Mountain Timber Co.* v. *Washington*, 243 U. S. 219 (claim that workmen's compensation violates republican government held nonjusticiable); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (claim that rule requiring invalidation of statute by all but one justice of state court negated

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governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." 139 U. S., at 461. But the Court did not find any of these fundamental principles violated.

[48] But cf. *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221; *National Prohibition Cases*, 253 U. S. 350.

republican government held nonjusticiable); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 (claim that delegation to agency of power to control milk prices violated republican government, rejected).

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question. In *Georgia* v. *Stanton*, 73 U. S. (6 Wall.) 50, the State sought by an original bill to enjoin execution of the Reconstruction Acts, claiming that it already possessed "a republican State, in every political, legal, constitutional, and juridical sense," and that enforcement of the new Acts "instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, . . . is destroying that very government by force."[50] Congress had clearly refused to recognize the republican character of the government of the suing State.[51] It seemed to the Court that the only constitutional claim that could be presented was under the Guaranty Clause, and Congress having determined that the effects of the recent hostilities required extraordinary measures to restore governments of a republican form, this Court refused to interfere with Congress' action at the behest of a claimant relying on that very guaranty.[52]

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[50] 73 U. S., at 65, 66.

[51] The First Reconstruction Act opened: "Whereas no legal State governments . . . now exists [*sic*] in the rebel States of . . . Georgia [and] Mississippi, . . .: and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: . . ." 14 Stat. 428. And see 15 Stat. 2, 14.

[52] In *Mississippi* v. *Johnson*, 71 U. S. (4 Wall.) 475, the State sought to enjoin the President from executing the Acts, alleging that his role

In only a few other cases has the Court considered Art. IV, § 4, in relation to congressional action. It has refused to pass on a claim relying on the Guaranty Clause to establish that Congress lacked power to allow the States to employ the referendum in passing on legislation redistricting for congressional seats. *Ohio ex rel. Davis* v. *Hildebrandt*, *supra*. And it has pointed out that Congress is not required to establish republican government in the territories before they become States, and before they have attained a sufficient population to warrant a popularly elected legislature. *Downes* v. *Bidwell*, 182 U. S. 244, 278–279 (dictum).[32]

We come, finally to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present.

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was purely ministerial. The Court held that the duties were in no sense ministerial, and that although the State sought to compel inaction rather than action, the absolute lack of precedent for any such distinction left the case one in which "general principles . . . forbid judicial interference with the exercise of Executive discretion." 71 U. S., at 499. See also *Mississippi* v. *Stanton*, 154 U. S. 554; and see 2 Warren, The Supreme Court in United States History (Rev. ed.), 463.

For another instance of congressional action challenged as transgressing the Guaranty Clause, see *The Collector* v. *Day*, 78 U. S. (11 Wall.) 113, 125–126, overruled, *Graves* v. *O'Keefe*, 306 U. S. 466.

[32] On the other hand, the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action. It has been held that the clause gives Congress no power to impose restrictions upon a State's admission which would undercut the constitutional mandate that the States be on an equal footing. *Coyle* v. *Smith*, 221 U. S. 559. And in *Texas* v. *White*, 74 U. S. (7 Wall.) 700, although Congress had determined that the State's government was not republican in form, the State's standing to bring an original action in this Court was sustained.

We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home [54] if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

In this connection special attention is due *Pacific States Tel. Co.* v. *Oregon*, 223 U. S. 118. In that case a corporation tax statute enacted by the initiative was attacked ostensibly on three grounds: (1) due process; (2) equal

[54] See, *infra*, p. 48, considering *Kidd* v. *McCanless*, 352 U. S. 920.

protection; and (3) the Guaranty Clause. But it was clear that the first two grounds were invoked solely in aid of the contention that the tax was invalid by reason of its passage:

> "The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it [*sic*] not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." 223 U. S., at 150–151.

The due process and equal protection claims were held nonjusticiable in *Pacific States* not because they happened to be joined with a Guaranty Clause claim, or

because they sought to place before the court a subject matter which might conceivably have been dealt with through the Guaranty Clause, but because the Court believed that they were invoked merely in verbal aid of the resolution of issues which, in its view, entailed political questions. *Pacific States* may be compared with cases such as *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, wherein the Court refused to consider whether a workmen's compensation act violated the Guaranty Clause but considered at length, and rejected, due process and equal protection arguments advanced against it; and *O'Neill* v. *Leamer*, 239 U. S. 244, wherein the Court refused to consider whether Nebraska's delegation of power to form drainage districts violated the Guaranty Clause, but went on to consider and reject the contention that the action against which an injunction was sought was not a taking for a public purpose.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought "political," can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization. Brief examination of a few cases demonstrates this.

When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" [55] have rested

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[55] *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 183 (Field, J., dissenting).

on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim. For example, in *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, we reversed the Nebraska Supreme Court's decision that Nebraska's Governor was not a citizen of the United States or of the State and therefore could not continue in office. In *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. (2 Otto) 480, and *Foster* v. *Kansas ex rel. Johnston*, 112 U. S. 201, we considered whether persons had been removed from public office by procedures consistent with the Fourteenth Amendment's due process guaranty, and held on the merits that they had. And only last Term, in *Gomillion* v. *Lightfoot*, 364 U. S. 339, we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in the face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries.[58]

Gomillion was brought by a Negro who had been a resident of the City of Tuskegee, Alabama, until the municipal boundaries were so recast by the State Legislature as to exclude practically all Negroes. The plaintiff claimed deprivation of the right to vote in municipal elections. The District Court's dismissal for want of jurisdiction and failure to state a claim upon which relief could be granted was affirmed by the Court of Appeals. This Court unanimously reversed. This Court's answer to the argument that States enjoyed unrestricted control over municipal boundaries was:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . The opposite conclusion, urged upon us

[58] *Gomillion* v. *Lightfoot*, 270 F. 2d 594, relying upon, *inter alia*, *Hunter* v. *Pittsburgh*, 207 U. S. 161.

by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'" 364 U. S., at 344–345.

To a second argument, that *Colegrove* v. *Green*, *supra*, was a barrier to hearing the merits of the case, the Court responded that *Gomillion* was lifted "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation" because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment.

"A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. . . . While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove* v. *Green*.

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S., at 347.[87]

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[87] The Court's opinion was joined by MR. JUSTICE DOUGLAS, noting his adherence to the dissents in *Colegrove* and *South* v. *Peters*, *supra*; and the judgment was concurred in by MR. JUSTICE WHITTAKER, who wrote that the decision should rest on the Equal Protection Clause rather than on the Fifteenth Amendment, since there had been not

We have not overlooked such cases as *In re Sawyer*, 124 U. S. 200, and *Walton* v. *House of Representatives*, 265 U. S. 487, which held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer. But these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters of state governmental organization. This is clear not only from the opinions in those cases, but also from *White* v. *Berry*, 171 U. S. 366, which, relying on *Sawyer*, withheld federal equity from staying removal of a *federal* officer. *Wilson* v. *North Carolina*, 169 U. S. 586, simply dismissed an appeal from an unsuccessful suit to upset a State's removal procedure, on the ground that the constitutional claim presented—that a jury trial was necessary if the removal procedure was to comport with due process requirements—was frivolous. Finally, in *Taylor and Marshall* v. *Beckham (No. 1)*, 178 U. S. 548, where losing candidates attacked the constitutionality of Kentucky's resolution of a contested gubernatorial election, the Court refused to consider the merits of a claim posited upon the Guaranty Clause, holding it presented a political question, but also held on the merits that the ousted candidates had suffered no deprivation of property without due process of law.[58]

Since, as has been established, the equal protection claim tendered in this case does not require decision of any political question, and since the presence of a matter affecting state government does not render the case nonjusticiable, it seems appropriate to examine again the reasoning by which the District Court reached its conclusion that the case was nonjusticiable.

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solely a denial of the vote (if there had been that at all) but also a "fencing out" of a racial group.

[58] No holding to the contrary is to be found in *Cave* v. *Newell*, 246 U. S. 650, dismissing a writ of error to the Supreme Court of Missouri, 272 Mo. 653, 199 S. W. 1014; or in *Snowden* v. *Hughes*, 321 U. S. 1.

We have already noted that the District Court's holding that the subject matter of this complaint was nonjusticiable relied upon *Colegrove* v. *Green*, *supra*, and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley* v. *Holm*, 285 U. S. 355, *Koenig* v. *Flynn*, 285 U. S. 375, and *Carroll* v. *Becker*, 285 U. S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley* v. *Holm*, but in two opinions, one for three Justices, 328 U. S., at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U. S., at 564. The argument that congressional redistricting problems presented a "political question" the resolution of which was confided to Congress might have been rested upon Art. I, § 4, Art. I, § 5, Art. I, § 2, and Amendment XIV, § 2. Mr. Justice Rutledge said: "But for the ruling in *Smiley* v. *Holm*, 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, § 2 [but see Amendment XIV, § 2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Numbers'; and Art. I, § 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree. . . . Assuming that that decision is to stand, I think . . . that its effect is to

rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U. S., at 564–565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that "The shortness of the time remaining [before forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause." 328 U. S., at 565–566.[*]

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[*] The ground of Mr. Justice Rutledge's vote to affirm is further explained in his footnote 3, 328 U. S., at 566: "'The power of a court of equity to act is a discretionary one. . . . Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only "to prevent irreparable injury which is clear and imminent."' *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593 and cases cited."

No constitutional questions, including the question whether voters have a judicially enforceable constitutional right to vote at elections of congressmen from districts of equal population, were decided in *Colegrove*. Six of the participating Justices reached the questions but divided three to three on their merits. Mr. Justice Rutledge believed that it was not necessary to decide them. He said: "There is [an alternative to constitutional decision] in this case. And I think the gravity of the constitutional questions raised so great, together with the possibilities for collision [with the political departments of the Government], that the admonition [against avoidable constitutional decision] is appropriate to be followed here. Other reasons support this view, including the fact that, in my opinion, the basic ruling and less important ones in *Smiley* v. *Holm*, *supra*, would otherwise be brought into question." 328 U. S., at 564–565. He also joined with his brethren who shared his view that the issues were justiciable in considering that *Wood* v. *Broom*, 287 U. S. 1, decided no constitutional questions but "the Court disposed of the cause on the ground that the 1929 Reapportionment Act, 46 Stat. 21, did not carry forward

Article I, §§ 2, 4 and 5 and Amendment XIV, § 2 relate only to congressional elections and obviously do not govern apportionment of state legislatures. However, our decisions in favor of justiciability even in light of those provisions plainly afford no support for the District Court's conclusion that the subject matter of this controversy presents a political question. Indeed, the refusal to award relief in *Colegrove* resulted only from the controlling view of a want of equity. Nor is anything contrary to be found in those *per curiams* that came after *Colegrove*. This Court dismissed the appeals in *Cook* v. *Fortson* and *Turman* v. *Duckworth*, 329 U. S. 675, as moot. *MacDougall* v. *Green*, 335 U. S. 281, held only that in that case equity would not act to void the State's requirement that there be at least a minimum of support for nominees for state-wide office, over at least a minimal area of the State. Problems of timing were critical in *Remmey* v. *Smith*, 342 U. S. 916, dismissing for want of a substantial federal question a three-judge court's dismissal of the suit as prematurely brought, 102 F. Supp. 708; and in *Hartsfield* v. *Sloan*, 357 U. S. 916, denying mandamus sought to compel the convening of a three-judge court—movants urged the Court to advance consideration of their case, "inasmuch as the mere lapse of time before this case can be reached in the normal course of . . . business may defeat the cause, and inasmuch as the time problem is due to the inherent nature of the case . . . ." *South* v. *Peters*, 339 U. S. 276, like *Colegrove* appears to be a refusal to exercise equity's powers; see the statement of the holding, quoted, *supra*, p. 17. And *Cox* v. *Peters*, 342 U. S. 936, dismissed for want of a substantial federal question the appeal from the state court's holding that their primary elections implicated no "state action." See

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the requirements of the 1911 Act, 37 Stat. 13, and declined to decide whether there was equity in the bill." 328 U. S., at 565; see also, *id.*, at 573. We agree with this view of *Wood* v. *Broom*.

208 Ga. 498, 67 S. E. 2d 579. But compare *Terry* v. *Adams*, 345 U. S. 461.

Tedesco v. *Board of Supervisors*, 339 U. S. 940, indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting. See 43 So. 2d 514. Similarly, in *Anderson* v. *Jordan*, 343 U. S. 912, it was certain only that the state court had refused to issue a discretionary writ, original mandamus in the Supreme Court. That had been denied without opinion, and of course it was urged here that an adequate state ground barred this Court's review. And in *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S. W. 2d 40, the Supreme Court of Tennessee held that it could not invalidate the very statute at issue in the case at bar, but its holding rested on its state law of remedies, *i. e.*, the state view of *de facto* officers,[60] and not on any view that the norm for legislative apportionment in Tennessee is not numbers of qualified voters resident in the several counties. Of course this Court was there precluded by the adequate state ground, and in dismissing the appeal, 352 U. S. 920, we cited *Anderson*, *supra*, as well as *Colegrove*. Nor does the Tennessee court's decision in that case bear upon this, for just as in *Smith* v. *Holm*, 220 Minn. 486, 19 N. W. 2d 914, and *Magraw* v. *Donovan*, 163 F. Supp. 184, 177 F. Supp. 803, a state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of federal constitutional rights. Problems of relief also controlled in *Radford* v. *Gary*, 352 U. S. 991, affirming the District

[60] See also *Buford* v. *State Board of Elections*, 206 Tenn. 480, 334 S. W. 2d 726; *State ex rel. Sanborn* v. *Davidson County Board of Election Comm'rs*, No. 36, 391 Tenn. Sup. Ct., Oct. 29, 1954 (unreported); 8 Vand. L. Rev. 501.

Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, and if they did not comply, to mandamus the State Supreme Court to do so. And *Matthews* v. *Handley*, 361 U. S. 127, affirmed a refusal to strike down the State's gross income tax statute—urged on the ground that the legislature was malapportioned—that had rested on the adequacy of available state legal remedies for suits involving that tax, including challenges to its constitutionality. Lastly, *Colegrove* v. *Barrett*, 330 U. S. 804, in which Mr. Justice Rutledge concurred in this Court's refusal to note the appeal from a dismissal for want of equity, is sufficiently explained by his statement in *Cook* v. *Fortson*, *supra*: "The discretionary exercise or non-exercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case where the facts differ." 329 U. S., at 678, n. 8. (Citations omitted.)

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITTAKER did not participate in the decision of this case.

APPENDIX.

The Tennessee Code Annotated provides for representation in the General Assembly as follows:

"3-101. *Composition—Counties electing one representative each.*—The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Sumner, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. [Acts 1881 (E. S.), ch. 5, § 1; 1881 (E. S.), ch. 6, § 1; 1901, ch. 122, § 2; 1907, ch. 178, §§ 1, 2; 1915, ch. 145; Shan., § 123; Acts 1919, ch. 147, §§ 1, 2; 1925 Private, ch. 472, § 1; Code 1932, § 140; Acts 1935, ch. 150, § 1; 1941, ch. 58, § 1; 1945, ch. 68, § 1; C. Supp. 1950, § 140.]

"3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. [Acts 1901, ch. 122, § 3; Shan., § 124; mod. Code 1932, § 141.]

"3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. [Acts 1901, ch. 122, § 4; Shan., § 125; Code 1932, § 142.]

"3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. [Acts 1901, ch. 122, § 5; Shan., § 126; Code 1932, § 143.]

"3-105. *Shelby county.*—Shelby county shall elect eight (8) representatives. Said county shall consist of eight (8) representative districts, numbered one (1) through eight (8), each district co-extensive with the county, with one (1) representative to be elected from each district. [Acts 1901, ch. 122, § 6; Shan., § 126a1; Code 1932, § 144; Acts 1957, ch. 220, § 1; 1959, ch. 213, § 1.]

"3-106. *Joint representatives.*—The following counties jointly, shall elect one representative, as follows, to wit:

"First district—Johnson and Carter.

"Second district—Sullivan and Hawkins.

"Third district—Washington, Greene and Unicoi.

"Fourth district—Jefferson and Hamblen.

"Fifth district—Hancock and Grainger.

"Sixth district—Scott, Campbell, and Union.

"Seventh district—Anderson and Morgan.

"Eighth district—Knox and Loudon.

"Ninth district—Polk and Bradley.

"Tenth district—Meigs and Rhea.

"Eleventh district—Cumberland, Bledsoe, Sequatchie, Van Buren and Grundy.

"Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.

"Fourteenth district—Sumner, Trousdale and Macon.

"Fifteenth district—Davidson and Wilson.

"Seventeenth district—Giles, Lewis, Maury and Wayne.

"Eighteenth district—Williamson, Cheatham and Robertson.

"Nineteenth district—Montgomery and Houston.

"Twentieth district—Humphreys and Perry.

"Twenty-first district—Benton and Decatur.

"Twenty-second district—Henry, Weakley and Carroll.

"Twenty-third district—Madison and Henderson.

"Twenty-sixth district—Tipton and Lauderdale. [Acts 1901, ch. 122, § 7; 1907, ch. 178, §§ 1, 2; 1915, ch. 145, §§ 1, 2; Shan., § 127; Acts 1919, ch. 147, § 1; 1925 Private, ch. 472, § 2; Code 1932, § 145; Acts 1933, ch. 167, § 1; 1935, ch. 150, § 2; 1941, ch. 58, § 2; 1945, ch. 68, § 2; C. Supp. 1950, § 145; Acts 1957, ch. 220, § 2.]

"3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

"First district—Johnson, Carter, Unicoi, Greene, and Washington.

"Second district—Sullivan and Hawkins.

"Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.

"Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.

"Fifth district—Knox.

"Sixth district—Knox, Loudon, Anderson, and Roane.

"Seventh district—McMinn, Bradley, Monroe, and Polk.

"Eighth district—Hamilton.

"Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White, and Cumberland.

"Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.

"Eleventh district—Marion, Franklin, Grundy and Warren.

"Twelfth district—Rutherford, Cannon, and DeKalb.

"Thirteenth district—Wilson and Smith.

"Fourteenth district—Sumner, Trousdale and Macon.

"Fifteenth district—Montgomery and Robertson.

"Sixteenth district—Davidson.

"Seventeenth district—Davidson.

"Eighteenth district—Bedford, Coffee and Moore.

"Nineteenth district—Lincoln and Marshall.

"Twentieth district—Maury, Perry and Lewis.

"Twenty-first district—Hickman, Williamson and Cheatham.

"Twenty-second district—Giles, Lawrence and Wayne.

"Twenty-third district—Dickson, Humphreys, Houston and Stewart.

"Twenty-fourth district—Henry and Carroll.

"Twenty-fifth district—Madison, Henderson and Chester.

"Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.

"Twenty-seventh district—Gibson.

"Twenty-eighth district—Lake, Obion and Weakley.

"Twenty-ninth district—Dyer, Lauderdale and Crockett.

"Thirtieth district—Tipton and Shelby.

"Thirty-first district—Haywood and Fayette.

"Thirty-second district—Shelby.

"Thirty-third district—Shelby. [Acts 1901, ch. 122, § 1; 1907, ch. 3, § 1; Shan., § 128; Code 1932, § 146; Acts 1945, ch. 11, § 1; C. Supp. 1950, § 146.]"

Today's apportionment statute is as enacted in 1901, with minor changes. For example:

(1) In 1957, Shelby County was raised from 7½ to 8 representatives. Acts of 1957, c. 220. See also Acts of 1959, c. 213. The 1957 Act, § 2, abolished the Twenty-seventh Joint Representative District, which had included Shelby and Fayette Counties.

(2) In 1907, Marion County was given a whole House seat instead of sharing a joint seat with Franklin County. Acts of 1907, c. 178. Acts of 1915, c. 145, repealed that change, restoring the *status quo ante*. And that reversal was itself reversed, Acts of 1919, c. 147.

(3) James County was in 1901 one of five counties in the Seventh State Senate District and one of the three in the Ninth House District. It appears that James County no longer exists but we are not advised when or how it was dissolved.

(4) In 1945, Anderson and Roane Counties were shifted to the Sixth State Senate District from the Seventh, and Monroe and Polk Counties were shifted to the Seventh from the Sixth. Acts of 1945, c. 11.

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. | On Appeal From the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court and, like the Court, do not reach the merits, a word of explanation is necessary.[1] I put to one side the problems of "political" questions involving the distribution of power between this Court, the Congress, and the Chief Executive. We have here a phase of the recurring problem of the relation of the federal courts to state agencies. More particularly, the question is the extent to which a State may weight one person's vote more heavily than it does another's.

So far as voting rights are concerned, there are large gaps in the Constitution. Yet the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution. The House—and now the Senate—are chosen by the people. The time, manner, and place of elections of Senators and Representatives are left to the States (Article I, Section 4, Clause 1; Amendment XVII) subject to the regulatory power of Congress. A "republican form" of government is guaranteed each State by Article IV, Section 4, and each

[1] I feel strongly that many of the cases cited by the Court and involving so-called "political" questions were wrongly decided. In joining the opinion, I do not approve those decisions but only construe the Court's opinion in this case as stating an accurate historical account of what the prior cases have held.

is likewise promised protection against invasion.[2] *Ibid.* That the States may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that the House of Representatives shall be chosen by the

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[2] The statements in *Luther* v. *Borden*, 7 How. 1, 42, that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is "the Judge of the Elections, Returns, and Qualifications of its own Members." Article I, Section 5, Clause 1. But the abdication of all judicial functions respecting voting rights (7 How., at 41), however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr's Rebellion, states no general principle. It indeed is contrary to the cases discussed in the body of this opinion—the modern decisions of the Court that give the full panoply of judicial protection to voting rights. Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote of those "to whom it is denied by the written and established constitution and laws of the State." *Ibid.*

Moreover, the Court's refusal to examine the legality of the regime of martial law which had been laid upon Rhode Island (*id.*, at 45–46) is indefensible, as Mr. Justice Woodbury maintained in his dissent. *Id.*, at 59 *et seq.* Today we would ask with him: ". . . who could hold for a moment, when the writ of habeas corpus cannot be suspended by the legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency?" *Id.*, at 67.

Justice Woodbury went on to say:

"It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to

people and that "the Electors (voters) in each State shall have the Qualifications requisite for Electors (voters) of the most numerous Branch of the State Legislature." The same provision, contained in the Seventeenth Amendment, governs the election of Senators. Within limits those qualifications may be fixed by state law. See *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, 50–51. Yet, as stated in *Ex parte Yarbrough*, 110 U. S. 651, 663–664, those who vote for members of Congress do not "owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively upon the law of the State." The power of Congress to prescribe the qualifications for voters and thus override state law is not in issue here. It is, however, clear that by reason of the commands of the Constitution there are several qualifications that a State may not require.

Race, color, or previous condition of servitude are impermissible standards by reason of the Fifteenth

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allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet.

"No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men.

"Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however the Assembly of Rhode Island, under the exigency, may have hastily supposed that such a measure in this instance was constitutional. It is but a branch of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law." *Id.*, at 69–70.

What he wrote was later to become the tradition, as expressed by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 401: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

Amendment, and that alone is sufficient to explain *Gomillion* v. *Lightfoot*, 364 U. S. 339. See Taper, Gomillion versus Lightfoot (1962), pp. 12–17.

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See *Skinner* v. *Oklahoma*, 316 U. S. 535, 541. Universal equality is not the test; there is room for weighting. As we stated in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County. The opportunity to prove that an "invidious discrimination" exists should therefore be given the appellants.

It is said that any decision in cases of this kind is beyond the competence of courts. Some make the same point as regards the problem of equal protection in cases involving racial segregation. Yet the legality of claims and conduct is a traditional subject for judicial determination. Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be

seen in a decree apportioning water among the several States. *Nebraska* v. *Wyoming*, 325 U. S. 589, 665. The constitutional guide is often vague, as the decisions under the Due Process and Commerce Clauses show. The problem under the Equal Protection Clause is no more intricate. See Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1083–1084.

There are, of course, some questions beyond judicial competence. Where the performance of a "duty" is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other (*Kentucky* v. *Dennison*, 24 How. 66, 109), for to do so would be to take over the office. Cf. *Federal Communications Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 145.

Where the Constitution assigns a particular function wholly and indivisibly [2] to another department, the federal

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[2] The category of the "political" question is in my view narrower than the decided cases indicate. "Even the English courts have held that a resolution of one House of Parliament does not change the law (*Stockdale* v. *Hansard*, [1839] 9A & E 1; and *Bowles* v. *Bank of England* (No. 2), [1913] 1 Ch. 57), and these decisions imply that the House of Commons acting alone does not constitute the 'Parliament' recognised by the English courts." 103 Sol. Jour. 995, 996. The Court in *Bowles* v. *Bank of England*, *supra*, pp. 84–85, stated: "By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown

judiciary does not intervene. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. None of those cases is relevant here.

There is no doubt that the federal courts have jurisdiction of controversies concerning voting rights. The Civil Rights Act gives them authority to redress the deprivation "under color of any state law" of any "right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . ." 28 U. S. C. § 1343 (3). And 28 U. S. C. § 1343 (4) gives the federal courts authority to award damages or issue an injunction "to redress the violation of any Act of Congress providing for the protection of civil rights, including the *right to vote*." (Italics added.) The element of state action covers a

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in levying a tax before such tax is actually imposed by Act of Parliament."

In *The Pocket Veto Case*, 279 U. S. 655, the Court undertook a review of the veto provisions of the Constitution and concluded that the measure in litigation had not become a law. Cf. *Coleman* v. *Miller*, 307 U. S. 433.

Georgia v. *Stanton*, 6 Wall. 50, involved the application of the Reconstruction Acts to Georgia—laws which destroyed by force the internal regime of that State. Yet the Court refused to take jurisdiction. That question was no more "political" than a host of others we have entertained. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Alabama* v. *Texas*, 347 U. S. 272.

Today would this Court hold nonjusticiable or "political" a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?

Georgia v. *Stanton*, *supra*, expresses a philosophy at war with *Ex parte Milligan*, 4 Wall. 2, and *Duncan* v. *Kahanamoku*, 327 U. S. 304. The dominance of the civilian authority has been expressed from the beginning. See *Wise* v. *Withers*, 3 Cranch 331, 337; *Sterling* v. *Constantin*, *supra* note 2.

wide range. For as stated in *United States* v. *Classic*, 313 U. S. 299, 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." And see *Monroe* v. *Pape*, 365 U. S. 167.

The right to vote in both federal and state elections was protected by the judiciary long before that right received the explicit protection it is now accorded by § 1343 (4). Discrimination against a voter on account of race has been penalized (*Ex parte Yarbrough*, 110 U. S. 651) or struck down. *Nixon* v. *Herndon*, 273 U. S. 536; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461. Fraudulent acts that dilute the votes of some have long been held to be within judicial cognizance. *Ex parte Siebold*, 100 U. S. 371. The "right to have one's vote counted" whatever his race or nationality or creed was held in *United States* v. *Morley*, 238 U. S. 383, 386, to be "as open to protection by Congress as the right to put a ballot in a box." See also *United States* v. *Classic*, *supra*, 324–325; *United States* v. *Saylor*, 322 U. S. 385.

Chief Justice Holt stated in *Ashby* v. *White*, 2 Ld. Raym. 938, 956 (a suit in which damages were awarded against election officials for not accepting the plaintiff's vote, 3 Ld. Raym. 320) that:

> "To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation."

The same prophylactic effect will be produced here, as entrenched political regimes make other relief as

illusory in this case as a petition to Parliament in *Ashby* v. *White* would have been.[4]

Intrusion of the Federal Government into the election machinery of the States has taken numerous forms—investigations (*Hannah* v. *Larche*, 363 U. S. 420); criminal proceedings (*Ex parte Siebold, supra; Ex parte Yarbrough, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra*); collection of penalties (*Smith* v. *Allwright, supra*); suits for declaratory relief and for an injunction (*Terry* v. *Adams, supra*); suits by the United States under the Civil Rights Act to enjoin discriminatory practices. *United States* v. *Raines*, 362 U. S. 17.

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[4] We are told by the National Institute of Municipal Law Offices in an *amicus* brief:

"Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs, political representation in the majority of state legislatures is 50 or more years behind the times. Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

"As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population. These demands will become even greater by 1970 when some 150 million people will be living in urban areas.

"The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

"Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states." *Amicus* brief, pp. 2–3.

As stated by Judge McLaughlin in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 236 (an apportionment case in Hawaii which was reversed and dismissed as moot, 256 F. 2d 728):

> "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

With the exceptions of *Colegrove* v. *Green*, 328 U. S. 549; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276, and the decisions they spawned, the Court has never thought that protection of voting rights was beyond judicial cognizance. Today's treatment of those cases removes the only impediment to judicial cognizance of the claims stated in the present complaint. The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.[5]

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[5] The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (*Cedar Rapids* v. *Cox*, — Iowa —; 108 N. W. 2d 253, 262–263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct.

There need be no fear of a more disastrous collision between federal and state agencies here than where a federal court enjoins gerrymandering based on racial lines. See *Gomillion* v. *Lightfoot*, *supra*.

The District Court need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality merely by directing respondent to eliminate the egregious injustices. Or its conclusion that reapportionment should be made may in itself stimulate legislative action. That was the result in *Asbury Park*

Footnote 5—Continued.

Press v. *Woolley*, 33 N. J. 1, 161 A. 2d 705, where the state court ruled it had jurisdiction:

"If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The law-making body cannot by inaction alter the constitutional system under which it has its own existence." 33 N. J., at 14, 167 A. 2d, at —. The court withheld its decision on the merits in order that the legislature might have an opportunity to consider adoption of a reapportionment act. For the sequel see *Application of Lamb*, — N. J. —, 169 A. 2d 822, 825–826.

Reapportionment was also the result in *Magraw* v. *Donovan*, 159 F. Supp. 901, where a federal three-judge District Court took jurisdiction, saying, 163 F. Supp. 184, 187:

"Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. . . . Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been present to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.'"

See 177 F. Supp. 803, where the case was dismissed as moot, the State Legislature having acted.

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. | On Appeal from the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Mr. Justice Clark, concurring.

One emerging from the rash of opinions with their accompanying clashing of views may well find himself suffering a mental blindness. The Court holds that the appellants have alleged a cause of action. However, it refuses to award relief here—although the facts are undisputed—and fails to give the District Court any guidance whatever. One dissenting opinion, bursting with words that go through so much and conclude with so little, contemns the majority action as "a massive repudiation of the experience of our whole past." Another describes the complaint as merely asserting conclusory allegations that Tennessee's apportionment is "incorrect," "arbitrary," "obsolete," and "unconstitutional." I believe it can be shown that this case is distinguishable from earlier cases dealing with the distribution of political power by a State, that a patent violation of the Equal Protection Clause of the United States Constitution has been shown, and that an appropriate remedy may be formulated.

I.

I take the law of the case from *MacDougall* v. *Green*, 335 U. S. 281 (1948), which involved an attack under

the Equal Protection Clause upon an Illinois election statute. The Court decided that case on its merits without hindrance from the "political question" doctrine. Although the statute under attack was upheld, it is clear that the Court based its decision upon the determination that the statute represented a rational state policy. It stated:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a *proper* diffusion of political initiative as between its thinly populated counties and those having concentrated masses, *in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.*" *Id.*, at 284. (Emphasis supplied.)

The other cases upon which my Brethren dwell are all distinguishable or inapposite. The widely heralded case of *Colegrove* v. *Green*, 328 U. S. 549 (1946), was one not only in which the Court was bob-tailed but in which there was no majority opinion. Indeed, even the "political question" point in MR. JUSTICE FRANKFURTER'S opinion was no more than an alternative ground.[1] Moreover, the appellants did not present an equal protection argument.[2] While it has served as a Mother Hubbard to most of the subsequent cases, I feel it was in that respect ill-

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[1] The opinion stated that the Court "could also dispose of this case on the authority of *Wood* v. *Broom* [287 U. S. 1 (1932)]." *Wood* v. *Broom* involved only the interpretation of a congressional reapportionment Act.

[2] Similarly, the Equal Protection Clause was not invoked in *Tedesco* v. *Board of Supervisors*, 339 U. S. 940 (1950).

cast and for all of these reasons put it to one side.[3] Likewise, I do not consider the Guaranty Clause cases based on Art. I, § 4, of the Constitution, because it is not invoked here and it involves different criteria, as the Court's opinion indicates. Cases resting on various other considerations not present here, such as *Radford* v. *Gary*, 352 U. S. 991 (1957) (lack of equity); *Kraal* v. *McCanless*, 352 U. S. 920 (1956) (adequate state grounds supporting the state judgment); *Anderson* v. *Jordan*, 343 U. S. 912 (1952) (adequate state grounds); *Remmey* v. *Smith*, 342 U. S. 916 (1952) (failure to exhaust state procedures), are of course not controlling. Finally, the Georgia county unit system cases, such as *South* v. *Peters*, 339 U. S. 276 (1950), reflect the viewpoint of *MacDougall*, *i. e.*, to refrain from intervening where there is some rational policy behind the State's system.[4]

II.

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House. But this might not on its face be an "invidious discrimination," *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483, 489 (1955), for

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[3] I do not read the later case of *Colegrove* v. *Barrett*, 330 U. S. 804 (1947), as having rejected the equal protection argument adopted here. That was merely a dismissal of an appeal where the equal protection point was mentioned along with attacks under three other constitutional provisions, two congressional Acts, and three state constitutional provisions.

[4] Georgia based its election system on a consistent combination of political units and population, giving six unit votes to the eight most populous counties, four unit votes to the 30 counties next in population, and two unit votes to each of the remaining counties.

a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961).

It is true that the apportionment policy incorporated in Tennessee's Constitution, *i. e.*, state-wide numerical equality of representation with certain minor qualifications,[5] is a rational one. On a county-by-county comparison a districting plan based thereon naturally will have disparities in representation due to the qualifications. But this to my mind does not raise constitutional problems, for the overall policy is reasonable. However, the root of the trouble is not in Tennessee's Constitution, for admittedly its policy has not been followed. The discrimination lies in the action of Tennessee's Assembly in allocating legislative seats to counties or districts created by it. Try as one may, Tennessee's apportionment just cannot be made to fit the pattern cut by its Constitution. This was the finding of the District Court. The policy of the Constitution referred to by the dissenters, therefore, is of no relevance here. We must examine what the Assembly has done.[6] The frequency and magnitude of the inequalities in the present districting admit of no policy whatever. An examination of Table I accompanying this opinion conclusively reveals that the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions. This is not to say that some of the disparity cannot be explained, but when the entire Table is examined—

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[5] See Part I of the Appendix to MR. JUSTICE HARLAN's dissent.

[6] It is suggested that the districting is not unconstitutional since it was established by a statute that was constitutional when passed some 60 years ago. But many Assembly Sessions since that time have deliberately refused to change the original act, and in any event "a statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 (1935).

comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties—it leaves but one conclusion, namely that Tennessee's apportionment is a crazy quilt without rational basis. At the risk of being accused of picking out a few of the horribles I shall allude to a series of examples that are taken from Table I.

As is admitted there is a wide disparity of voting strength between the large and small counties. Some samples are: Moore County has a total representation of two [7] with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,303) though the latter has four times the population; likewise, Loudon County (13,264), Houston (3,084), and Anderson County (33,990) have the same representation, *i. e.*, 1.25 each. But it is said that in this illustration all of the under-represented counties contain municipalities of over 10,000 population and they therefore should be included under the "urban" classification, rationalizing this disparity as an attempt to effect a rural-urban political balance. But in so doing one is

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[7] "Total representation" indicates the combined representation in the State Senate (33 members) and the State House of Representatives (99 members) in the Assembly of Tennessee. Assuming a county has one representative, it is credited in this calculation with 1/99. Likewise, if the same county has one-third of a senate seat it is credited with another 1/99, and thus such a county, in our calculation, would have a "total representation" of two; if a county has one representative and one-sixth of a senate seat, it is credited with 1.5/99, or 1.50. It is this last figure that I use here in an effort to make the comparisons clear. The 1950 rather than the 1960 census of voting population is used to avoid the charge that use of 1960 tabulations might not have allowed sufficient time for the State to act. However, the 1960 picture is even more irrational than the 1950 one.

caught up in the backlash of his own bull whip, for many counties have municipalities with a population exceeding 10,000, yet the same invidious discrimination is present. For example:

County	Population	Representatives
Carter	23,303	1.10
Maury	24,556	2.25
Washington	38,967	1.93
Madison	37,245	3.50

Likewise, counties with no municipality of over 10,000 suffer a similar discrimination:

County	Population	Representatives
Grundy	8,540	0.95
Chester	6,201	2.00
Cumberland	9,593	0.63
Crockett	9,676	2.00
Loudon	13,264	1.25
Fayette	13,577	2.50

This could not be an effort to give political balance between rural and urban populations. Since discrimination is present among counties of like population, the plan is neither consistent nor rational. It discriminates horizontally, creating gross disparities between rural areas themselves as well as between urban areas themselves,[8] still maintaining the wide vertical disparity already pointed out between rural and urban.

It is also insisted that the representation formula used above (see n. 7) is "patently deficient" because "it eliminates from consideration the relative voting power of the

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[8] Of course this was not the case in the Georgia county unit system, *South* v. *Peters*, *supra*, or the Illinois initiative plan, *MacDougall* v. *Green*, *supra*, where recognized political units having independent significance were given minimum political weight.

counties that are joined together in a single election district." This is a strange claim coming from those who rely on the proposition that "the voice of every voter" need not have "approximate equality." Indeed, representative government, as they say, is not necessarily one of "bare numbers." The use of floterial districts in our political system is not ordinarily based on the theory that the floterial representative is splintered among the counties of his district per relative population. His function is to represent the whole district. However, I shall meet the charge on its own ground and by use of its "adjusted 'total representation'" formula show that the present apportionment is loco. For example, compare some "urban" areas of like populations, using the HARLAN formula:

County	Population	Representation
Washington	36,967	2.65
Madison	37,245	4.87
Carter	23,303	1.48
Greene	23,649	2.05
Maury	24,556	3.81
Coffee	13,406	2.32
Hamblen	14,090	1.07

And now, using the same formula, compare some so-called "rural" areas of like population:

County	Population	Representation
Moore	2,340	1.23
Pickett	2,565	.22
Stewart	5,238	1.60
Cheatham	5,263	.74
Chester	6,391	1.36
Grundy	6,540	.69
Smith	8,731	2.04
Unicoi	8,787	0.40

And for counties with similar representation but with gross differences in population, take:

County	Population	Representation
Sullivan	55,712	4.07
Maury	24,556	3.81
Blount	30,353	2.12
Coffee	13,406	2.32

These cannot be "distorted effects," for here the same formula proposed by the dissenters is used and the result is even "a crazier" quilt.

The truth is that—although this case has been here for two years and has had over six hours' argument (three times the ordinary case) and has been most carefully considered over and over again by us in Conference and individually—no one, not even the State nor the dissenters, has come up with any rational basis for Tennessee's apportionment statute.

No one—except the dissenters advocating the HARLAN "adjusted 'total representation' " formula—contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting. The discrimination here does not fit any pattern—as I have said, it is but a crazy quilt. My Brother HARLAN contends that other proposed apportionment plans contain disparities. Instead of chasing those rabbits he should first pause long enough to meet appellants proof of discrimination by showing that in fact the present plan follows a rational policy. Not being able to do this, he merely counters with such generalities as "classic legislative judgment," no "significant discrepancy," and "de minimis departures." I submit that even a casual glance at the present apportionment picture shows these conclusions to be entirely fanciful. If present representation has a policy at all, it is to maintain the *status quo* of invidious

discrimination at any cost. Like the District Court, I conclude that appellants have met the burden of showing "Tennessee is guilty of a clear violation of the state constitution and of the [federal] rights of the plaintiffs. . . ."

III.

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an "informed, civically militant electorate" and "an aroused popular conscience," but it does not sear "the conscience of the people's representatives." This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result,[9] and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without

[9] It is interesting to note that state judges often rest their decisions on the ground that this Court has precluded adjudication of the federal claim. See, *e. g.*, *Scholle* v. *Hare*, 360 Mich. 1, 104 N. W. 2d 63 (1960).

substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.

IV.

Finally, we must consider if there are any appropriate modes of effective judicial relief. The federal courts are, of course, not forums for political debate, nor should they resolve themselves into state constitutional conventions or legislative assemblies. Nor should their jurisdiction be exercised in the hope that such a declaration, as is made today, may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief. To my mind this would be nothing less than blackjacking the Assembly into reapportioning the State. If judicial competence were lacking to fashion an effective decree, I would dismiss this appeal. However, like the Solicitor General of the United States, I see no such difficulty in the position of this case. One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and might be more effective. But the plan here suggested would at least release the strangle hold now on the Assembly and permit it to redistrict itself.

In this regard the appellants have proposed a plan based on the rationale of state-wide equal representation. Not believing that numerical equality of representation throughout a State is constitutionally required, I would not apply such a standard albeit a permissive one. Nevertheless, the dissenters attack it by the application of the HARLAN "adjusted 'total representation'" formula.

The result is that some isolated inequalities are shown, but this in itself does not make the proposed plan irrational or place it in the "crazy quilt" category. Such inequalities as the dissenters point out in attempting to support the present apportionment as rational, are explainable. Moreover, there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an invidious discrimination.

In view of the detailed study that the Court has given this problem, it is unfortunate that a decision is not reached on the merits. The majority appears to hold, at least *sub silentio*, that an invidious discrimination is present, but it remands to the three-judge court for it to make what is certain to be that formal determination. It is true that Tennessee has not filed a formal answer. However, it has filed voluminous papers and made extended arguments supporting its position. At no time has it been able to contradict the appellants' factual claims; it has offered no rational explanation for the present apportionment; indeed, it has indicated that there are none known to it. As I have emphasized, the case proceeded to the point before the three-judge court that it was able to find an invidious discrimination factually present, and the State has not contested that holding here. In view of all this background I doubt if anything more can be offered or will be gained by the State on remand, other than time. Nevertheless, not being able to muster a court to dispose of the case on the merits, I concur in the opinion of the majority and acquiesce in the decision to remand. However, in fairness I do think that Tennessee is entitled to have my idea of what it faces on the record before us and the trial court some light as to how it might proceed.

As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure the national rights.[10] Its decision today supports the proposition for which our forebears fought and many died, namely that "to be fully conformable to the principle of right, the form of government must be representative." That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.

[10] 1 Farrand, The Records of the Federal Convention of 1787, 124.

TABLE I.

County	1960 voting population	Present total representation using J. Clark's formula	Present total representation using J. Harlan's formula	Proposed total representation (appellant's plan), using J. Harlan's formula
Van Buren	2,039	.63	.23	.11
Moore	2,340	2.00	1.23	.18
Pickett	2,565	.70	.22	.24
Sequatchie	2,904	.63	.33	.19
Meigs	3,039	.93	.48	.17
Houston	3,084	1.25	.46	.24
Trousdale	3,351	1.33	.43	.12
Lewis	3,413	1.25	.39	.25
Perry	3,711	1.50	.71	.40
Bledsoe	4,198	.63	.49	.24
Clay	4,528	.70	.40	.42
Union	4,600	.76	.37	.45
Hancock	4,710	.93	.62	.49
Stewart	5,238	1.75	1.60	.41
Cheatham	5,263	1.33	.72	.20
Cannon	5,841	2.00	1.43	.52
Decatur	5,563	1.10	.79	.52
Lake	6,252	2.00	1.44	.41
Chester	6,391	2.00	1.36	.19
Grundy	6,540	.95	.69	.43
Humphreys	6,588	1.25	1.39	.72
Johnson	6,649	1.10	.42	.43
Jackson	6,719	1.50	1.43	.63
De Kalb	6,984	2.00	1.56	.68
Benton	7,023	1.10	1.01	.66
Fentress	7,057	.70	.62	.64
Grainger	7,125	.93	.94	.65
Wayne	7,176	1.25	.69	.76
Polk	7,330	1.25	.68	.73
Hickman	7,598	2.00	1.85	.80
Macon	7,974	1.33	1.01	.61
Morgan	8,308	.93	.59	.75
Scott	8,417	.76	.68	.62
Smith	8,731	2.50	2.04	.67
Unicoi	8,787	.93	.40	.63

County	1960 voting population	Present total representation using J. Clark's formula	Present total representation using J. Harlan's formula	Proposed total representation (appellants' plan), using J. Harlan's formula
Rhea	8,937	.93	1.42	.21
White	9,244	1.43	1.69	.90
Overton	9,474	1.70	1.83	.80
Hardin	9,577	1.80	1.61	.93
Cumberland	9,903	.53	1.10	.57
Crockett	9,676	2.00	1.66	.63
Henderson	10,199	1.50	.78	.96
Marion	10,998	1.75	1.73	.72
Marshall	11,288	2.50	2.28	.84
Dickson	11,294	1.75	2.29	1.23
Jefferson	11,389	1.10	.87	1.03
McNairy	11,601	1.60	1.74	1.13
Cocke	12,572	1.60	1.46	.89
Sevier	12,793	1.60	1.47	.89
Claiborne	12,799	1.43	1.61	1.34
Monroe	12,884	1.75	1.68	1.30
Loudon	13,264	1.25	.28	.52
Warren	13,337	1.75	1.89	1.68
Coffee	13,406	2.00	2.32	1.68
Hardeman	13,565	1.60	1.86	1.11
Fayette	13,577	2.50	2.48	1.11
Haywood	13,934	2.50	2.52	1.69
Williamson	14,064	2.33	2.96	1.71
Hamblen	14,090	1.10	1.07	1.67
Franklin	14,297	1.75	1.95	1.73
Lauderdale	14,413	2.50	2.45	1.73
Bedford	14,732	2.00	1.45	1.74
Lincoln	15,092	2.50	2.72	1.77
Henry	15,465	2.83	2.76	1.73
Lawrence	15,847	2.00	2.22	1.81
Giles	15,935	2.25	2.54	1.81
Tipton	15,944	3.00	1.68	1.13
Robertson	16,456	2.83	2.62	1.85
Wilson	16,459	3.00	3.03	1.21
Carroll	16,472	2.83	2.88	1.82
Hawkins	16,900	3.00	1.93	1.82
Putnam	17,071	1.70	2.50	1.86

County	1960 voting population	Present total representation using J. Clark's formula	Present total representation using J. Harlan's formula	Proposed total representative (appellant's plan), using J. Harlan's formula
Campbell	17,477	.76	1.40	1.94
Roane	17,639	1.75	1.26	1.30
Weakley	18,007	2.33	2.63	1.85
Bradley	18,273	1.25	1.67	1.92
McMinn	18,347	1.75	1.97	1.92
Obion	18,434	2.00	2.30	1.94
Dyer	20,062	2.00	2.36	2.32
Sumner	20,143	2.33	3.56	2.54
Carter	23,303	1.10	1.48	2.55
Greene	23,649	1.93	2.05	2.68
Maury	24,556	2.25	3.81	2.85
Rutherford	25,316	2.00	3.02	2.39
Montgomery	26,284	3.00	3.73	3.06
Gibson	29,832	5.00	5.00	2.86
Blount	30,353	1.60	2.12	2.19
Anderson	33,990	1.25	1.30	3.62
Washington	36,967	1.93	2.65	3.45
Madison	37,245	3.50	4.87	3.69
Sullivan	55,712	3.00	4.07	5.57
Hamilton	131,971	6.00	6.00	15.09
Knox	140,559	7.25	8.96	15.21
Davidson	211,930	12.50	12.93	21.57
Shelby	312,345	15.50	16.85	31.59

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al.	On Appeal From the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Mr. Justice Stewart, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today's decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes." *Ante*, p. —.

The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary—without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court does not say or imply that "state legislatures must be so structured as to reflect with approximate equality the voice of every voter." *Post*, p. —. The Court does not say or imply that there is anything in the Federal Con-

stitution "to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people." *Post*, p. —. And contrary to the suggestion of my Brother DOUGLAS, the Court most assuredly does not decide the question, "may a State weight the vote of one county or one district more heavily than it weights the vote in another?" *Ante*, p. —.

In *MacDougall* v. *Green*, 335 U. S. 281, the Court held that the Equal Protection Clause does not "deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." 335 U. S., at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan* v. *Maryland*, 366 U. S. 420, 425. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584.

Today's decision does not turn its back on these settled precedents. I repeat, the Court today decides only: (1) that the District Court possessed jurisdiction of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing. My Brother CLARK has made a convincing prima facie showing that Tennessee's system of apportionment is in fact utterly arbitrary—without any possible justification in rationality. My Brother HARLAN has, with imagination and ingenuity, hypothesized possibly rational bases

for Tennessee's system. But the merits of this case are not before us now. The defendants have not yet had an opportunity to be heard in defense of the State's system of apportionment; indeed, they have not yet even filed an answer to the complaint. As in her cases, the proper place for the trial is in the trial court, not here.

SUPREME COURT OF THE UNITED STATES

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Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment,

in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guide-lines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is devoid of reality as "a brooding omnipresence in the sky" for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. One of the Court's supporting opinions, as elucidated by commentary, unwittingly affords a disheartening preview of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants), into which this Court today catapults the lower courts of the country without so much as adumbrating the basis for a legal calculus as a means of extrication. Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal

standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.

Recent legislation, creating a district appropriately described as "an atrocity of ingenuity," is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts.* Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there's

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*It is worth reminding that the problem of legislative apportionment is not one dividing North and South. Indeed, in the present House of Representatives, for example, Michigan's congressional districts are far less representative of the numbers of inhabitants, according to the 1960 census, than are Louisiana's. Michigan's Sixteenth District, which is 93.1% urban, contains 802,994 persons and its Twelfth, which is 47.6% urban, contains 177,431—one-fifth as many persons. Louisiana's most populous district, the Sixth, is 53.6% urban and contains 536,029 persons, and its least populous, the Eighth, 36.7% urban, contains 263,850—nearly half. Gross disregard of any assumption that our political system implies even approximation to the notion that individual votes in the various districts within a State should have equal weight is as true, *e. g.*, of California, Illinois, and Ohio as it is of Georgia. See United States Department of Commerce, Census Release, February 24, 1962, CB62-23.

the rub. In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognised as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only an euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

This is the latest in the series of cases in which the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been invoked in federal courts as restrictions upon the power of the States to allocate elec-

toral weight among the voting populations of their various geographical subdivisions.[1] The present action, which comes here on appeal from an order of a statutory three-judge District Court dismissing amended complaints seeking declaratory and injunctive relief, challenges the provisions of Tenn. Code Ann., 1955, §§ 3-101 to 3-109, which apportion state representative and senatorial seats among Tennessee's ninety-five counties.

The original plaintiffs, citizens and qualified voters entitled to vote for members of the Tennessee Legislature in the several counties in which they respectively reside, bring this action in their own behalf and "on behalf of all other voters in the State of Tennessee," or, as they alternatively assert, "on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated." The cities of Knoxville and Chattanooga and the Mayor of Nashville—on his own behalf as a qualified voter and, pursuant to an authorizing resolution by the Nashville City Council, as a representative of all the city's residents—were permitted to intervene as parties plain-

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[1] See *Wood* v. *Broom*, 287 U. S. 1; *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied, 329 U. S. 828; *Cook* v. *Fortson*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Turman* v. *Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Colegrove* v. *Barrett*, 330 U. S. 804; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276; *Tedesco* v. *Board of Supervisors*, 339 U. S. 940; *Remmey* v. *Smith*, 342 U. S. 916; *Cox* v. *Peters*, 342 U. S. 936, rehearing denied, 343 U. S. 921; *Anderson* v. *Jordan*, 343 U. S. 912; *Kidd* v. *McCanless*, 352 U. S. 920; *Radford* v. *Gary*, 352 U. S. 991; *Hartsfield* v. *Sloan*, 357 U. S. 916; *Matthews* v. *Handley*, 361 U. S. 127; *Perry* v. *Folsom*, 144 F. Supp. 874 (D. C. N. D. Ala.); *Magraw* v. *Donovan*, 163 F. Supp. 184 (D. C. D. Minn.); cf. *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. C. D. Hawaii). And see *Keogh* v. *Neely*, 50 F 2d 685 (C. A. 7th Cir.).

tiff.[2] The defendants are executive officials charged with statutory duties in connection with state elections.[3]

The original plaintiffs' amended complaint avers, in substance, the following.[4] The Constitution of the State of Tennessee declares that "elections shall be free and equal," provides that no qualifications other than age, citizenship and specified residence requirements shall be attached to the right of suffrage, and prohibits denying to any person the suffrage to which he is entitled except upon conviction of an infamous crime. Art. I, § 5; Art.

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[2] Although the motion to intervene by the Mayor of Nashville asserted an interest in the litigation in only a representative capacity, the complaint which he subsequently filed set forth that he was a qualified voter who also sued in his own behalf. The municipalities of Knoxville and Chattanooga purport to represent their residents. Since the claims of the municipal intervenors do not differ materially from those of the parties who sue as individual voters, the Court need not now determine whether the municipalities are proper parties to this proceeding. See, *e. g.*, *Stewart* v. *Kansas City*, 239 U. S. 14.

[3] The original complaint named as defendants Tennessee's Secretary of State, Attorney General, Coordinator of Elections, and the three members of the State Board of Elections, seeking to make the Board members representatives of all the State's County Election Commissioners. The prayer in an intervening complaint by the City of Knoxville, that the Commissioners of Elections of Knox County be added as parties defendant seems not to have been acted on by the court below. Defendants moved to dismiss, *inter alia*, on the ground of failure to join indispensable parties, and they argue in this Court that only the County Election Commissioners of the ninety-five counties are the effective administrators of Tennessee's elections laws, and that none of the defendants have substantial duties in connection therewith. The District Court deferred ruling on this ground of the motion. Inasmuch as it involves questions of local law more appropriately decided by judges sitting in Tennessee than by this Court, and since in any event the failure to join County Election Commissioners in this action looking to prospective relief could be corrected, if necessary, by amendment of the complaints, the issue does not concern the Court on this appeal.

[4] Jurisdiction is predicated upon R. S. § 1979, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3).

IV, § 1. It requires an enumeration of qualified voters within every term of ten years after 1871 and an apportionment of representatives and senators among the several counties or districts according to the number of qualified voters in each[5] at the time of each decennial enumeration. Art. II, §§ 4, 5, 6. Notwithstanding these provisions, the State Legislature has not reapportioned itself since 1901. The Reapportionment Act of that year, Tenn. Acts 1901, c. 122, now Tenn. Code Ann., 1955, §§ 3-101 to 3-109,[6] was unconstitutional when enacted,

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[5] However, counties having two-thirds of the ratio required for a Representative are entitled to seat one member in the House, and there are certain geographical restrictions upon the formation of Senate districts. The applicable provisions of Article II of the Tennessee Constitution are:

"*Sec. 4. Census.*—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

"*Sec. 5. Apportionment of representatives.*—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member."

"*Sec. 6. Apportionment of senators.*—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

[6] It is alleged that certain amendments to the Act of 1901 made only minor modifications of that Act, adjusting the boundaries of individual districts in a manner not material to plaintiffs' claims.

because not preceded by the required enumeration of qualified voters and because it allocated legislative seats arbitrarily, unequally and discriminatorily, as measured by the 1900 federal census. Moreover, irrespective of the question of its validity in 1901, it is asserted that the Act became "unconstitutional and obsolete" in 1911 by virtue of the decennial reapportionment requirement of the Tennessee Constitution. Continuing a "purposeful and systematic plan to discriminate against a geographic class of persons," recent Tennessee Legislatures have failed, as did their predecessors, to enact reapportionment legislation, although a number of bills providing for reapportionment have been introduced. Because of population shifts since 1901, the apportionment fixed by the Act of that year and still in effect is not proportionate to population, denies to the counties in which the plaintiffs live an additional number of representatives to which they are entitled, and renders plaintiffs' votes "not as effective as the votes of the voters residing in other senatorial and representative districts . . . ." Plaintiffs "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly . . .," and the totality of the malapportionment's effect—which permits a minority of about thirty-seven percent of the voting population of the State to control twenty of the thirty-three members of Tennessee's Senate, and a minority of forty percent of the voting population to control sixty-three of the ninety-nine members of the House—results in "a distortion of the constitutional system" established by the Federal and State Constitutions, prevents the General Assembly "from being a body representative of the people of the State of Tennessee, . . ." and is "contrary to the basic principle of representative government . . .," and "contrary to the philosophy of government in the United States and all Anglo-Saxon jurisprudence . . . ."

Exhibits appended to the complaint purport to demonstrate the extent of the inequalities of which plaintiffs complain. Based upon "approximate voting population,"[1] these set forth figures showing that the State Senator from Tennessee's most populous senatorial district represents five and two-tenths times the number of voters represented by the Senator from the least populous district, while the corresponding ratio for most and least populous House districts is more than eighteen to one. The General Assembly thus apportioned has discriminated against the underrepresented counties and in favor of the overrepresented counties in the collection and distribution of various taxes and tax revenues, notably in the distribution of school and highway-improvement funds,[2]

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[1] The exhibits do not reveal the source of the population figures which they set forth, but it appears that the figures were taken from the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 41, at 76-91. These census figures represent the total population over twenty-one years of age in each Tennessee county; they do not purport to enumerate "qualified voters" or "qualified electors," the measure of apportionment prescribed by the Tennessee Constitution. See note 5, *supra*. To qualify to vote in Tennessee, in addition to fulfilling the age requirement, an individual must be a citizen of the United States, a resident of the State for twelve months and of the county where he offers his vote for six months next preceding the election, and must not be under the disqualification attaching to conviction for certain offenses. Tenn. Code Ann., 1955, §§ 2-201, 2-205. The statistics found in the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 42, at 92-97, suggest that the residence requirement, in particular, may be an unknown variable of considerable significance. Appellants do not suggest a means by which a court, on the basis of the federal census figures, can determine the number of qualified voters in the various Tennessee counties.

[2] The "county aid funds" derived from a portion of a state gasoline privilege tax, for example, are distributed among the counties as follows: one-half equally among the ninety-five counties, one-quarter on the basis of area, one-quarter on the basis of population, to be used by

this discrimination being "made possible and effective" by the Legislature's failure to reapportion itself. Plaintiffs conclude that election of the State Legislature pursuant to the apportionment fixed by the 1901 Act violates the Tennessee Constitution and deprives them of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment. Their prayer below was for a declaratory judgment striking down the Act, an injunction restraining defendants from any acts necessary to the holding of elections in the districts prescribed by Tenn. Code Ann., 1955, §§ 3–101 to 3–109, until such time as the legislature is reapportioned "according to the Constitution of the State of Tennessee," and an order directing defendants to declare the next primary and general elections for members of the Tennessee Legislature on an at-large basis—the thirty-three senatorial candidates and the ninety-nine representative candidates receiving the highest number of votes to be declared elected.[9]

Motions to dismiss for want of jurisdiction of the subject matter and for failure to state a claim were made and granted, 179 F. Supp. 824, the District Court relying upon this Court's series of decisions beginning with *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied, 329 U. S. 828. The original and intervening plaintiffs bring the case here on appeal. 364 U. S. 898. In this Court they have altered their request for relief, suggesting a "step-by-step approach." The first step is a remand to the District Court with directions to vacate the order dismissing the complaint and to enter an order

county authorities in the building, repairing and improving of county roads and bridges. Tenn. Code. Ann., 1955, § 54–403. Appellants urge that this distribution is discriminatory.

[9] Plaintiffs also suggested, as an alternative to at-large elections, that the District Court might itself redistrict the State. They did not, however, expressly pray such relief.

retaining jurisdiction, providing "the necessary spur to legislative action . . . ." If this proves insufficient, appellants will ask the "additional spur" of an injunction prohibiting elections under the 1901 Act, or a declaration of the Act's unconstitutionality, or both. Finally, all other means failing, the District Court is invited by the plaintiffs, greatly daring, to order an election at large or redistrict the State itself or through a master. The Solicitor General of the United States, who has filed a brief *amicus* and argued in favor of reversal, asks the Court on this appeal to hold only that the District Court has "jurisdiction" and may properly exercise it to entertain the plaintiffs' claims on the merits. This would leave to that court after remand the questions of the challenged statute's constitutionality and of some undefined, unadumbrated relief in the event a constitutional violation is found. After an argument at the last Term, the case was set down for reargument, 366 U. S. 907, and heard this Term.

I.

In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years are overruled or disregarded. Explicitly it begins with *Colegrove* v. *Green, supra*, decided in 1946, but its roots run deep in the Court's historic adjudicatory process.

Colegrove held that a federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection Clause and other federal constitutional and statutory provisions, of a state statute establishing the respective districts for the State's election of Representatives to the Congress. Two opinions were written by the four Justices who composed the majority of the seven sitting members of the Court. Both opinions joining in the result in

Colegrove v. *Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power. While the two opinions show a divergence of view regarding some of these considerations, there are important points of concurrence. Both opinions demonstrate a predominant concern, first, with avoiding federal judicial involvement in matters traditionally left to legislative policy-making; second, with respect to the difficulty—in view of the nature of the problems of apportionment and its history in this country—of drawing on or devising judicial standards for judgment, as opposed to legislative determinations, of the part which mere numerical equality among voters should play as a criterion for the allocation of political power; and, third, with problems of finding appropriate modes of relief—particularly, the problem of resolving the essentially political issue of the relative merits of at-large elections and elections held in districts of unequal population.

The broad applicability of these considerations—summarized in the loose shorthand phrase, "political question"—in cases involving a State's apportionment of voting power among its numerous localities has led the Court, since 1946, to recognize their controlling effect in a variety of situations. (In all these cases decision was by a full Court.) The "political question" principle as applied in *Colegrove* has found wide application commensurate with its function as "one of the rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 570. In *Colegrove* v. *Barrett*, 330 U. S. 804, litigants brought suit in a Federal District Court challenging as offensive to the Equal Protection Clause Illinois' state legislative apportionment laws. They pointed to state constitutional provisions requiring decennial reapportionment and allocation of seats in proportion to population, alleged a failure to reapportion for more than

forty-five years—during which time extensive population shifts had rendered the legislative districts grossly unequal—and sought declaratory and injunctive relief with respect to all elections to be held thereafter. After the complaint was dismissed by the District Court, this Court dismissed an appeal for want of a substantial federal question. A similar District Court decision was affirmed here in *Radford* v. *Gary*, 352 U. S. 991. And cf. *Remmey* v. *Smith*, 342 U. S. 916. In *Tedesco* v. *Board of Supervisors*, 339 U. S. 940, the Court declined to hear, for want of a substantial federal question, the claim that the division of a municipality into voting districts of unequal population for the selection for councilmen fell afoul of the Fourteenth Amendment, and in *Cox* v. *Peters*, 342 U. S. 936, rehearing denied, 343 U. S. 921, it found no substantial federal question raised by a state court's dismissal of a claim for damages for "devaluation" of plaintiff's vote by application of Georgia's county-unit system in a primary election for the Democratic gubernatorial candidate. The same Georgia system was subsequently attacked in a complaint for declaratory judgment and an injunction; the federal district judge declined to take the requisite steps for the convening of a statutory three-judge court; and this Court, in *Hartsfield* v. *Sloan*, 357 U. S. 916, denied a motion for leave to file a petition for a writ of mandamus to compel the district judge to act. In *MacDougall* v. *Green*, 335 U. S. 281, 283, the Court noted that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and, citing the *Colegrove* cases, declined to find in "such broad constitutional concepts as due process and equal protection of the laws," *id.*, at 284, a warrant for federal judicial invalidation of an Illinois statute requiring as a condition for the formation of a new political party the securing of at least two hundred signatures from each of fifty counties. And in *South* v.

Peters, 339 U. S. 276, another suit attacking Georgia's county-unit law, it affirmed a District Court dismissal, saying

> "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *Id.*, at 277.

Of course it is important to recognize particular, relevant diversities among comprehensively similar situations. Appellants seek to distinguish several of this Court's prior decisions on one or another ground—*Colegrove* v. *Green* on the ground that congressional, not state legislative, apportionment was involved; *Remmey* v. *Smith* on the ground that state judicial remedies had not been tried; *Radford* v. *Gary* on the ground that Oklahoma has the initiative, whereas Tennessee does not. It would only darken counsel to discuss the relevance and significance of each of these assertedly distinguishing factors here and in the context of this entire line of cases. Suffice it that they do not serve to distinguish *Colegrove* v. *Barrett*, *supra*, which is on all fours with the present case, or to distinguish *Kidd* v. *McCanless*, 352 U. S. 920, in which the full Court without dissent, only five years ago, dismissed on authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan*, 343 U. S. 912, an appeal from the Supreme Court of Tennessee in which a precisely similar attack was made upon the very statute now challenged. If the weight and momentum of an unvarying course of carefully considered decisions are to be respected, appellants' claims are foreclosed not only by precedents governing the exact facts of the present case but are themselves supported by authority the more persuasive in that it gives effect to the *Colegrove* principle in distinctly varying circumstances in which state arrangements allocating

relative degrees of political influence among geographic groups of voters were challenged under the Fourteenth Amendment.

II.

The *Colegrove* doctrine, in the form in which repeated decisions have settled it, was not an innovation. It represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. To classify the various instances as "political questions" is rather a form of stating this conclusion than revealing of analysis.[10] Some of the cases so labelled have no relevance here. But from others emerge unifying considerations that are compelling.

1. The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters. While this concern alone undoubtedly accounts for many of the decisions,[11] others do not fit the pattern. It would hardly embarrass the conduct of war were this Court to deter-

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[10] See Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 45 *et seq.* (1961).

[11] See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 634, 635; *The Divina Pastora*, 4 Wheat. 52; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *Kennett* v. *Chambers*, 14 How. 38; *Doe* v. *Braden*, 16 How. 635; *Jones* v. *United States*, 137 U. S. 202; *Terlinden* v. *Ames*, 184 U. S. 270; *Charlton* v. *Kelly*, 229 U. S. 447; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ex parte Peru*, 318 U. S. 578; *Clark* v. *Allen*, 331 U. S. 503. Compare *Foster and Elam* v. *Neilson*, 2 Pet. 253 with *United States* v. *Arredondo*, 6 Pet. 691. Of course, judgment concerning the "political" nature of even a controversy affecting the nation's foreign affairs is not a simple mechanical matter, and certain of the Court's decisions have accorded scant weight to the consideration of unity of action in the conduct of external relations. Compare *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, with *United States* v. *Pink*, 315 U. S. 203.

mine, in connection with private transactions between litigants, the date upon which war is to be deemed terminated. But the Court has refused to do so. See, *e. g.*, *The Protector*, 12 Wall. 700; *Brown* v. *Hiatts*, 15 Wall. 177; *Adger* v. *Alston*, 15 Wall. 555; *Williams* v. *Bruffy*, 96 U. S. 176, 192–193. It does not suffice to explain such cases as *Ludecke* v. *Watkins*, 335 U. S. 160—deferring to political determination the question of the duration of war for purposes of the Presidential power to deport alien enemies—that judicial intrusion would seriously impede the President's power effectively to protect the country's interests in time of war. Of course, this is true; but the precise issue presented is the duration of the time of war which demands the power. Cf. *Martin* v. *Mott*, 12 Wheat. 19; *Lamar* v. *Browne*, 92 U. S. 187, 193; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Kahn* v. *Anderson*, 255 U. S. 1. And even for the purpose of determining the extent of congressional regulatory power over the tribes and dependent communities of Indians, it is ordinarily for Congress, not the Court, to determine whether or not a particular Indian group retains the characteristics constitutionally requisite to confer the power.[12] *E. g.*, *United States* v. *Holliday*, 3 Wall. 407; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Sandoval*, 231 U. S. 28. A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the politicial agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which

[12] Obviously, this is the equivalent of saying that the characteristics are not "constitutionally requisite" in a judicially enforceable sense. The recognition of their necessity as a condition of legislation is left, as is observance of certain other constitutional commands, to the conscience of the non-judicial organs. Cf. *Kentucky* v. *Dennison*, 24 How. 66.

a political decision affecting the question at issue between the parties can be judged. Where the question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where its determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action. See *Chicago & Southern Air Lines, Inc.*, v. *Waterman S. S. Corp.*, 333 U. S. 103. The dominant consideration is "the lack of satisfactory criteria for a judicial determination . . . ." Mr. Chief Justice Hughes, for the Court, in *Coleman* v. *Miller*, 307 U. S. 433, 454–455. Compare *United States* v. *Rogers*, 4 How. 567, 572, with *Worcester* v. *Georgia*, 6 Pet. 515.[13]

This may be, like so many questions of law, a matter of degree. Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines. Often in these cases illumination was found in the federal structures established by, or the underlying presuppositions of, the Constitution. With respect to such questions, the Court has recognized that, concerning a particular power of Congress put in issue, ". . . effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard* v. *Filburn*, 317 U. S. 111, 120. It is also true that even regarding the duration of war and the status of Indian tribes, referred to above as subjects ordinarily committed exclusively to the nonjudicial branches, the Court has suggested that some limitations exist upon the range within which the decisions of those branches will be permitted to go unreviewed.

[13] Also compare the *Coleman* case and *United States* v. *Sprague*, 282 U. S. 716, with *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221. See the *National Prohibition Cases*, 253 U. S. 350; and consider the Court's treatment of the several contentions in *Leser* v. *Garnett*, 258 U. S. 130.

See *United States* v. *Sandoval, supra,* at 46; cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543. But this is merely to acknowledge that particular circumstances may differ so greatly in degree as to differ thereby in kind, and that, although within a certain range of cases on a continuum, no standard of distinction can be found to tell between them, other cases will fall above or below the range. The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest. See the disposition of contentions based on logically distorting views of *Colegrove* v. *Green* and *Hunter* v. *Pittsburgh,* 207 U. S. 161, in *Gomillion* v. *Lightfoot,* 364 U. S. 339.

2. The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of state power challenged under broad federal guarantees. "We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been . . . such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution." *Wilson* v. *North Carolina,* 169 U. S. 586, 596. See *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548; *Walton* v. *House of Representatives,* 265 U. S. 487; *Snowden* v. *Hughes,* 321 U. S. 1. Cf. *In re Sawyer,* 124 U. S. 200, 220–221.

Where, however, state law has made particular federal questions determinative of relations within the structure of state government, not in challenge of it, the Court has resolved such narrow, legally defined questions in proper proceedings. See *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135. In such instances there is no conflict between state policy and the exercise of federal judicial power. This distinction explains the decisions in *Smiley* v. *Holm*, 285 U. S. 355; *Koenig* v. *Flynn*, 285 U. S. 375; and *Carroll* v. *Becker*, 285 U. S. 380, in which the Court released state constitutional provisions prescribing local lawmaking procedures from misconceived restriction of superior federal requirements. Adjudication of the federal claim involved in those cases was not one demanding the accommodation of conflicting interests for which no readily accessible judicial standards could be found. See *McPherson* v. *Blacker*, 146 U. S. 1, in which, in a case coming here on writ of error from the judgment of a state court which had entertained it on the merits, the Court treated as justiciable the claim that a State could not constitutionally select its presidential electors by districts, but held that Art. II, § 1, cl. 2, of the Constitution left the mode of choosing electors in the absolute discretion of the States. Cf. *Pope* v. *Williams*, 193 U. S. 621; *Breedlove* v. *Suttles*, 302 U. S. 277. To read with literalness the abstracted jurisdictional discussion in the *McPherson* opinion reveals the danger of conceptions of "justiciability" derived from talk and not from the effective decision in a case. In probing beneath the surface of cases in which the Court has declined to interfere with the actions of political organs of government, of decisive significance is whether in each situation the ultimate decision has been to intervene or not to intervene. Compare the reliance in *South* v. *Peters*, 339 U. S. 276, on *MacDougall* v. *Green*, 335 U. S. 281, and the "jurisdictional" form of the opinion in *Wilson* v. *North Carolina*, 169 U. S. 586, 596, *supra*.

3. The cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms, and it is no less true of the Equal Protection Clause of the Fourteenth. *Slaughter-House Cases*, 16 Wall. 36, 67–72; *Strauder* v. *West Virginia*, 100 U. S. 303, 306–307; *Nixon* v. *Herndon*, 273 U. S. 536, 541. Thus the Court, in cases involving discrimination against the Negro's right to vote, has recognized not only the action at law for damages,[14] but, in appropriate circumstances, the extraordinary remedy of declaratory or injuctive relief.[15] *Schnell* v. *Davis*, 336 U. S. 933; *Terry* v. *Adams*, 345 U. S. 461.[16] Injunctions in these cases, it should be noted, would not have restrained state-wide general elections. Compare *Giles* v. *Harris*, 189 U. S. 475.

4. The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sover-

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[14] *E. g.*, *Myers* v. *Anderson*, 238 U. S. 368; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 649. The action for damages for improperly rejecting an elector's vote had been given by the English law since the time of *Ashby* v *White*, 1 Brown's Cases in Parliament 62; 2 Ld. Raym. 938; 3 Ld. Raym. 320, a case which in its own day precipitated an intra-parliamentary war of major dimensions. See 6 Hansard, Parliamentary History of England (1810), 225–324, 376–436. Prior to the racial discrimination cases, this Court had recognized the action, by implication, in dictum in *Swafford* v. *Templeton*, 185 U. S. 487, and *Wiley* v. *Sinkler*, 179 U. S. 58, both respecting federal elections.

[15] Cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339.

[16] By statute an action for preventive relief is now given the United States in certain voting cases. 71 Stat. 637, 42 U. S. C. § 1971 (c), amending R. S. § 2004. See *United States* v. *Raines*, 362 U. S. 17; *United States* v. *Thomas*, 362 U. S. 58.

eignty, of government." *Massachusetts* v. *Mellon*, 262 U. S. 447, 485. See *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162; *New Jersey* v. *Sargent*, 269 U. S. 328, 337. The "political question" doctrine, in this aspect, reflects the policies underlying the requirement of "standing": that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry. See *Stearns* v. *Wood*, 236 U. S. 75; *Fairchild* v. *Hughes*, 258 U. S. 126; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91. What renders cases of this kind non-justiciable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; [17] nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy.[18] The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade. See *Texas* v. *White*, 7 Wall. 700; *White* v. *Hart*, 13 Wall. 646; *Phillips* v. *Payne*, 92 U. S. 130; *Marsh* v. *Burroughs*, 1 Woods 463, 471–472 (Bradley, Circuit Justice); cf. *Wilson* v. *Shaw*, 204 U. S. 24; but see *Coyle* v. *Smith*, 221 U. S. 559. Thus, where the Cherokee Nation sought by an original motion to restrain the State of Georgia from the enforcement of laws which assimilated Cherokee territory to the State's counties, abrogated Cherokee law, and abolished Cherokee government, the Court

[17] Compare *Rhode Island* v. *Massachusetts*, 12 Pet. 657, and cases following, with *Georgia* v. *Stanton*, 6 Wall. 50.

[18] Compare *Worcester* v. *Georgia*, 6 Pet. 515, with *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 20, 28 (Mr. Justice Johnson, concurring), 51 and 75 (Mr. Justice Thompson, dissenting).

held that such a claim was not judicially cognizable. *Cherokee Nation* v. *Georgia*, 5 Pet. 1.[19] And in *Georgia* v. *Stanton*, 6 Wall. 50, the Court dismissed for want of jurisdiction a bill by the State of Georgia seeking to enjoin enforcement of the Reconstruction Acts on the ground that the command by military districts which they established extinguished existing state government and replaced it with a form of government unauthorized by the Constitution:[20]

> "That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court." *Id.*, at 77.[21]

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[19] This was an alternative ground of Chief Justice Marshall's opinion for the Court. *Id.*, at 20. The question which Marshall reserved as "unnecessary to decide," *ibid.*, was not the justiciability of the bill in this aspect, but the "more doubtful" question whether that "part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession," might be entertained. *Ibid.* Mr. Justice Johnson, concurring, found the controversy nonjusticiable and would have put the ruling solely on this ground, *id.*, at 28, and Mr. Justice Thompson, in dissent, agreed that much of the matter in the bill was not fit for judicial determination. *Id.*, at 51, 75.

[20] Cf. *Mississippi* v. *Johnson*, 4 Wall. 475.

[21] Considerations similar to those which determined the *Cherokee Nation* case and *Georgia* v. *Stanton* no doubt explain the celebrated decision in *Nabob of the Carnatic* v. *East India Company*. 1 Vesey

5. The influence of these converging considerations—the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted—has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," [22] is not enforceable through the courts. *E. g., O'Neill* v. *Leamer*, 239 U. S. 244; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Cochran* v. *Board of Education*, 281 U. S. 370; *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U. S. 608.[23] Claims resting on this specific

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Jr. *371; 2 Vesey Jr. *56, rather than any attribution of a portion of British sovereignty, in respect of Indian affairs, to the company. The reluctance of the English Judges to involve themselves in contests of factional political power is of ancient standing. In *The Duke of York's Claim to the Crown*, 5 Rotuli Parl. 375, printed in Wambaugh, Cases on Constitutional Law (1915), 1, the role which the Judges were asked to play appears to have been rather that of advocates than of judges, but the answer which they returned to the Lords relied on reasons equally applicable to either role.

[22] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

[23] Cf. the cases holding that the Fourteenth Amendment imposes no such restriction upon the form of a State's governmental organization as will permit persons affected by government action to complain that in its organization principles of separation of powers have been violated. *E. g., Dreyer* v. *Illinois*, 187 U. S. 71; *Soliah* v. *Heskin*, 222 U. S. 522; *Houck* v. *Little River Drainage District*, 239 U. S. 254. The same consistent refusal of this Court to find that

guarantee of the Constitution have been held nonjusticiable which challenged state distribution of powers between the legislative and judicial branches, *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, state delegation of power to municipalities, *Kiernan* v. *Portland, Oregon*, 223 U. S. 151, state adoption of the referendum as a legislative institution, *Ohio ex rel. Davis* v. *Hildebrandt*, 241 U. S. 565, 569, and state restriction upon the power of state constitutional amendment, *Marshall* v. *Dye*, 231 U. S. 250, 256–257. The subject was fully considered in *Pacific States Telephone and Telegraph Co.* v. *Oregon*, 223 U. S. 118, in which the Court dismissed for want of jurisdiction a writ of error attacking a state license tax statute enacted by the initiative, on the claim that this mode of legislation was inconsistent with a Republican Form of Government and violated the Equal Protection Clause and other federal guarantees. After noting ". . . the ruinous destruction of legislative authority in matters purely political

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the federal Constitution restricts state power to design the structure of state political institutions is reflected in the cases rejecting claims arising out of the States' creation, alteration, or destruction of local subdivisions or their powers, insofar as these claims are made by the subdivisions themselves, see *Laramie County* v. *Albany County*, 92 U. S. 307; *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394; *Trenton* v. *New Jersey*, 262 U. S. 182; *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 389–390; *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, or by the whole body of their residents who share only a general, undifferentiated interest in their preservation. See *Hunter* v. *Pittsburgh*, 207 U. S. 161. The policy is also given effect by the denial of "standing" to persons seeking to challenge state action as infringing the interest of some separate unit within the State's administrative structure—a denial which precludes the arbitrament by federal courts of what are only disputes over the local allocation of government functions and powers. See, *e. g.*, *Smith* v. *Indiana*, 191 U. S. 138; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Marshall* v. *Dye*, 231 U. S. 250; *Stewart* v. *Kansas City*, 239 U. S. 14.

which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for," [24] the Court said:

> ". . . [The] essentially political nature [of this claim] is at once made manifest by understanding that the assault which the contention here advanced makes it [sic] not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exer-

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[24] 223 U. S., at 141. ". . . [T]he contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character." Compare *Luther* v. *Borden*, 7 How. 1, 38–39:

". . . For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

"When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

cise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." *Id.*, at 150–151.

The starting point of the doctrine applied in these cases is, of course, *Luther* v. *Borden*, 7 How. 1. The case arose out of the Dorr Rebellion in Rhode Island in 1841–1842. Rhode Island, at the time of the separation from England, had not adopted a new constitution but had continued, in its existence as an independent State, under its original royal Charter, with certain statutory alterations. This frame of government provided no means for amendment of the fundamental law; the right of suffrage was to be prescribed by legislation, which limited it to freeholders. In the 1830's, largely because of the growth of towns in which there developed a propertied class whose means were not represented by freehold estates, dissatisfaction arose with the suffrage qualifications of the charter government. In addition, population shifts had caused a dated apportionment of seats in the lower house to yield substantial numerical inequality of political influence, even among qualified voters. The towns felt themselves underrepresented, and agitation began for electoral reform. When the charter government failed to respond, popular meetings of those who favored the broader suffrage were held and elected delegates to a convention which met and drafted a state constitution. This constitution provided for universal manhood suffrage (with certain qualifications); and it was to be adopted by vote of the people at elections at which a similarly expansive franchise obtained. This new scheme of government was ratified at the polls and declared effective by the convention, but the government elected and organized under

it, with Dorr at its head, never came to power. The charter government denied the validity of the convention, the constitution and its government and, after an insignificant skirmish, routed Dorr and his followers. It meanwhile provided for the calling of its own convention, which drafted a constitution that went peacefully into effect in 1843.[25]

Luther v. *Borden* was a trespass action brought by one of Dorr's supporters in a United States Circuit Court to recover damages for the breaking and entering of his house. The defendants justified under military orders pursuant to martial law declared by the charter government, and plaintiff, by his reply, joined issue on the legality of the charter government subsequent to the adoption of the Dorr constitution. Evidence offered by the plaintiff tending to establish that the Dorr government was the rightful government of Rhode Island was rejected by the Circuit Court; the court charged the jury that the charter government was lawful; and on a verdict for defendants, plaintiff brought a writ of error to this Court.

The Court, through Mr. Chief Justice Taney, affirmed. After noting that the issue of the charter government's legality had been resolved in that government's favor by the state courts of Rhode Island—that the state courts, deeming the matter a political one unfit for judicial determination, had declined to entertain attacks upon the existence and authority of the charter government—the Chief Justice held that the courts of the United States must follow those of the State in this regard. *Id.*, at

[25] See Bowen, The Recent Contest in Rhode Island (1844); Frieze, A Concise History of the Efforts to Obtain an Extension of Suffrage in Rhode Island; From the Year 1811 to 1842 (2d ed. 1842); Mowry, The Dorr War (1901); Wayland, The Affairs of Rhode Island (2d ed. 1842).

39–40. It was recognized that the compulsion to follow state law would not apply in a federal court in the face of a superior command found in the federal constitution, *ibid.*, but no such command was found. The Constitution, the Court said—referring to the Guarantee Clause of the Fourth Article—". . . as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." *Id.*, at 42.

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts." *Ibid.*[26]

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[26] The Court reasoned, with respect to the guarantee against domestic violence also contained in Art. IV, § 4, that this, too, was an authority committed solely to Congress; that Congress had

In determining this issue non-justiciable, the Court was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government.[27] It acknowledged that tradition had long entrusted questions of this nature to non-judicial processes,[28] and that judicial processes were unsuited to their decision.[29] The absence of guiding standards for judgment was critical, for the question whether the Dorr constitution had been rightfully adopted depended, in part, upon the extent of the franchise to be recognized—the very point of contention over which rebellion had been fought.

> ". . . [I]f the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges

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empowered the President, not the courts, to enforce it; and that it was inconceivable that the courts should assume a power to make determinations in the premises which might conflict with those of the Executive. It noted further that, in fact, the President had recognized the governor of the charter government as the lawful authority in Rhode Island, although it had been unnecessary to call out the militia in his support.

[27] See note 24, *supra*.

[28] *Id.*, at 39, 46–47.

[29] *Id.*, at 41–42.

the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." *Id.*, at 41.

Mr. Justice Woodbury (who dissented with respect to the effect of martial law) agreed with the Court regarding the inappropriateness of judicial inquiry into the issues:

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. . . .

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. . . . [D]isputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, . . . if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the

republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times . . . ." *Id.*, at 51–53.[30]

III.

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. We have been admonished to avoid "the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114. Art. IV, § 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable. Of course, if a controversy falls within judicial power, it depends "on how he [the plaintiff] casts his action," *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656, 662, whether he brings himself within a jurisdictional statute. But where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. When what was essentially a Guarantee Clause claim was sought to be laid, as well, under the Equal Protection Clause in *Pacific States Telephone & Telegraph Co.* v. *Oregon*, *supra*, the Court had no difficulty in "dis-

[30] In evaluating the Court's determination not to inquire into the authority of the charter government, it must be remembered that, throughout the country, Dorr "had received the sympathy of the Democratic press. His cause, therefore, became distinctly a party issue." 2 Warren, The Supreme Court in United States History (Rev. ed. 1937), 186.

pelling any mere confusion resulting from forms of expression and considering the substance of things . . . ." 223 U. S., at 140.

Here appellants attack "the State as a State," precisely as it was perceived to be attacked in the *Pacific States* case, *id.*, at 150. Their complaint is that the basis of representation of the Tennessee Legislature hurts them. They assert that "a minority now rules in Tennessee," that the apportionment statute results in a "distortion of the constitutional system," that the General Assembly is no longer "a body representative of the people of the State of Tennessee," all "contrary to the basic principle of representative government . . . ." Accepting appellants' own formulation of the issue, one can know this handsaw from a hawk. Such a claim would be nonjusticiable not merely under Art. IV, § 4, but under any clause of the Constitution, by virtue of the very fact that a federal court is not a forum for political debate. *Massachusetts* v. *Mellon*, *supra*.

But appellants, of course, do not rest on this claim *simpliciter*. In invoking the Equal Protection Clause, they assert that the distortion of representative government complained of is produced by systematic discrimination against them, by way of "a debasement of their votes . . . ." Does this characterization, with due regard for the facts from which it is derived, add anything to appellants' case?[31]

At first blush, this charge of discrimination based on legislative underrepresentation is given the appearance of

[31] Appellants also allege discrimination in the legislature's allocation of certain tax burdens and benefits. Whether or not such discrimination would violate the Equal Protection Clause if the tax statutes were challenged in a proper proceeding, see *Dane* v. *Jackson*, 256 U. S. 589; cf. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 268, these recitative allegations do not affect the nature of the controversy which appellants' complaints present.

a more private, less impersonal claim, than the assertion that the frame of government is askew. Appellants appear as representatives of a class that is prejudiced as a class, in contradistinction to the polity in its entirety. However, the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence. This, of course, is the practical effect of any allocation of power within the *institutions of government*. Hardly any distribution of political authority that could be assailed as rendering government non-republican would fail similarly to operate to the prejudice of some groups, and to the advantage of others, within the body politic. It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted.[32] But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state

[32] Appellants would find a "right" to have one's ballot counted on authority of *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299; *United States* v. *Saylor*, 322 U. S. 385. All that these cases hold is that conspiracies to commit certain sharp election practices which, in a federal election, cause ballots not to receive the weight which the law has in fact given them, may amount to deprivations of the constitutionally secured right to vote for federal officers. But see *United States* v. *Bathgate*, 246 U. S. 220. The cases do not so much as suggest that there exists a constitutional limitation upon the relative weight to which the law might properly entitle respective ballots, even in federal elections.

councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the *Court in this* case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion* v. *Lightfoot*, 364 U. S. 339, *supra*. What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. See *Luther* v. *Borden*, *supra*. Certainly, "equal protection" is no more secure

a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words "the basic principle of representative government"—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today. Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty cannot but give the appearance, if not reflect the reality, of

involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, "itself a historical product," *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31, provides no guide for judicial oversight of the representation problem.

1. *Great Britain.* Writing in 1958, Professor W. J. M. Mackenzie aptly summarized the British history of the principle of representation proportioned to population: "'Equal electoral districts' formed part of the programme of radical reform in England in the 1830s, the only part of that programme which has not been realised." [33] Until the late nineteenth century, the sole base of representation (with certain exceptions not now relevant) was the local geographical unit: each county or borough returned its fixed number of members, usually two for the English units, regardless of population.[34] Prior to the Reform Act of 1832, this system was marked by the almost total disfranchisement of the populous northern industrial centers, which had grown to significant size at the advent of the Industrial Revolution and had not been granted borough representation, and by the existence of the rotten borough, playing its substantial part in the Crown's struggle for continued control of the Commons.[35] In 1831, ten southernmost English counties, numbering three and a quarter million people, had two hundred and thirty-five parliamentary representatives, while the six northernmost counties, with more than three and a half-million people, had sixty-eight.[36] It was said that one hundred and eighty persons appointed three hundred and

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[33] Mackenzie, Free Elections (1958) (hereafter, Mackenzie), 108.

[34] Ogg, English Government and Politics (2d ed. 1936) (hereafter, Ogg), 248–250, 257; Seymour, Electoral Reform in England and Wales (1915) (hereafter, Seymour), 46–47.

[35] Ogg 257–259; Seymour 45–52; Carpenter, The Development of American Political Thought (1930) (hereafter, Carpenter), 45–46.

[36] Ogg 258.

fifty members in the Commons.[37] Less than a half-century earlier, Madison in the Federalist had remarked that half the House was returned by less than six thousand of the eight million people of England and Scotland.[38]

The Act of 1832, the product of a fierce partisan political struggle and the occasion of charges of gerrymandering not without foundation,[39] effected eradication of only the most extreme numerical inequalities of the unreformed system. It did not adopt the principle of representation based on population, but merely disfranchised certain among the rotten borrough and enfranchised most of the urban centers—still quite without regard to their relative numbers.[40] In the wake of the Act there remained substantial electoral inequality: the boroughs of Cornwall were represented sixteen times as weightily, judged by population, as the county's eastern division; the average ratio of seats to population in ten agricultural counties was four and a half times that in ten manufacturing divisions; Honiton, with about three thousand inhabitants, was equally represented with Liverpool, which had four hundred thousand.[41] In 1866 apportionment by population began to be advocated generally in the House, but was not made the basis of the redistribution of 1867, although the act of that year did apportion representation more evenly, gauged by the population standard.[42] Population shifts increased the surviving inequalities; by 1884 the representation ratio

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[37] Seymour 51.

[38] The Federalist, No. 56 (Wright ed. 1961), at 382. Compare Seymour 49. This takes account of the restricted franchise as well as the effect of the local-unit apportionment principle.

[39] Seymour 52–76.

[40] Ogg 264–265; Seymour 318–319.

[41] For these and other instances of gross inequality, see Seymour 320–325.

[42] Seymour 333–346; Ogg 265.

in many small boroughs was more than twenty-two times that of Birmingham or Manchester, forty-to-one disparities could be found elsewhere, and, in sum, in the '70's and '80's, a fourth of the electorate returned two-thirds of the members of the House.[43]

The first systematic English attempt to distribute seats by population was the Redistribution Act of 1885.[44] The statute still left ratios of inequality of as much as seven to one,[45] which had increased to fifteen to one by 1912.[46] In 1918 Parliament again responded to "shockingly bad" conditions of inequality,[47] and to partisan political inspiration,[48] by redistribution.[49] In 1944, redistribution was put on a periodic footing by the House of Commons (Redistribution of Seats) Act of that year,[50] which committed a continuing primary responsibility for reapportioning the Commons to administrative agencies (Boundary Commissions for England, Scotland, Wales and Northern Ireland, respectively).[51] The Commissions, having regard to certain rules prescribed for their guidance, are to prepare at designated intervals reports for the Home Secretary's submission to Parliament, along with the draft of an Order in Council to give effect to the

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[43] Seymour 349, 490–491.

[44] Seymour 489–518.

[45] Mackenzie 108; see also Seymour 513–517.

[46] Ogg 270.

[47] Ogg 253.

[48] Ogg 270–271.

[49] Ogg 273–274.

[50] 7 & 8 Geo. VI, c. 41. The 1944 Act was amended by the House of Commons (Redistribution of Seats) Act, 1947, 10 & 11 Geo. VI, c. 10, and the two, with other provisions, were consolidated in the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, since amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26.

[51] See generally Butler, The Redistribution of Seats, 33 Public Administration 125 (1955).

Commissions' recommendations. The districting rules adopt the basic principle of representation by population, although the principle is significantly modified by directions to respect local geographic boundaries as far as practicable, and by discretion to take account of special geographical conditions, including the size, shape and accessibility of constituencies. Under the original 1944 Act, the rules provided that (subject to the exercise of the discretion respecting special geographical conditions and to regard for the total size of the House of Commons as prescribed by the Act) so far as practicable, the single-member districts should not deviate more than twenty-five percent from the electoral quota (population divided by number of constituencies). However, apparently at the recommendation of the Boundary Commission for England, the twenty-five percent standard was eliminated as too restrictive in 1947, and replaced by the flexible provision that constituencies are to be as near the electoral quota as practicable, a rule which is expressly subordinated both to the consideration of special geographic conditions and to that of preserving local boundaries.[52] Free of the twenty-five percent rule, the Commissions drew up plans of distribution in which inequalities among the districts run, in ordinary cases, as high as two to one and, in the case of a few extraordinary constituencies, three to one.[53] The action of the Boundary Commission for England was twice challenged in the courts in 1954—the claim being that the Commission had violated statutory rules

[52] See note 50, *supra*. However, Commissions are given discretion to depart from the strict application of the local boundary rule to avoid excessive disparities between the electorate of a constituency and the electoral quota, or between the electorate of a constituency and that of neighboring constituencies. For detailed discussion, see Craig, Parliament and Boundary Commissions, [1959] Public Law 23. See also Butler, *supra*, note 51, at 127.

[53] Mackenzie 108, 113.

prescribing the standards for its judgment—and in both cases the Judges declined to intervene. In *Hammersmith Borough Council* v. *Boundary Commission for England*,[54] Harman, J., was of opinion that the nature of the controversy and the scheme of the Acts made the matter inappropriate for judicial interference, and in *Harper* v. *Secretary*,[55] the Court of Appeal, per Evershed, M. R., quoting Harman, J., with approval, adverting to the wide range of discretion entrusted to the Commission under the Acts, and remarking the delicate character of the parliamentary issues in which it was sought to engage the court, reached the same conclusion.[56]

The House of Commons (Redistribution of Seats) Act, 1958,[57] made two further amendments to the law. Responsive to the recommendation of the Boundary Commission for England,[58] the interval permitted between Commission reports was more than doubled, to a new maximum of fifteen years.[59] And at the suggestion of the same Commission that "It would ease the future labours of the Commission and remove much local irritation if Rule 5 [requiring that the electorate of each constituency be as near the electoral quota as practicable] were to be so amended as to allow us to make recommendations preserving the status quo in any area where such a course appeared to be desirable and not inconsistent

[54] The Times, Dec. 15, 1954, p. 4, cols. 1–2.

[55] [1955] 1 Ch. 238.

[56] The court reserved the question whether a judicial remedy might be found in a case in which it appeared that a Commission had manifestly acted in complete disregard of the Acts.

[57] Note 50, *supra*.

[58] First Periodical Report of the Boundary Commission for England [Cmd. 9311] (1954), 4, par. 19.

[59] Under the 1949 Act, see note 50, *supra*, the intervals between reports were to be not less than three nor more than seven years, with certain qualifications. The 1958 Act raised the minimum to ten and the maximum to fifteen years.

with the broad intention of the Rules," [80] the Commissions were directed to consider the inconveniences attendant upon the alteration of constituencies, and the local ties which such alteration might break. The Home Secretary's view of this amendment was that it worked to erect "a presumption against making changes unless there is a very strong case for them." [81]

2. *The Colonies and the Union.* For the guiding political theorists of the Revolutionary generation, the English system of representation, in its most salient aspects of numerical inequality, was a model to be avoided, not followed.[82] Nevertheless, the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies.[83] In some, as in Massachusetts and Rhode Island, numbers of electors were taken into account, in a rough fashion, by allotting increasing fixed quotas of representatives to several towns or classes of towns graduated by population, but in most of the colonies delegates were allowed to the local units without respect to numbers.[84] This resulted in grossly unequal electoral units.[85] The representation ratio in one North Carolina county was more than eight times that in another.[86] Moreover, American rotten boroughs had appeared,[87] and apportionment was made an instrument first in the politi-

[80] First Periodical Report, *supra*, note 58, at 4, par. 20.

[81] 582 H. C. Deb. (5th ser. 1957–1958), 230.

[82] See Madison, *supra*, note 38; Tudor, Life of James Otis (1823), 188–190.

[83] Griffith, The Rise and Development of the Gerrymander (1907) (hereafter, Griffith), 23–24.

[84] Luce, Legislative Principles (1930) (hereafter, Luce), 336–342.

[85] Griffith 25.

[86] Griffith 15–16, n. 1.

[87] Griffith 28.

cal struggles between the King or the royal governors and the colonial legislatures,[68] and, later, between the older tidewater regions in the colonies and the growing interior.[69] Madison in the Philadelphia Convention adverted to the "inequality of the Representation in the Legislatures of particular States, . . ." [70] arguing that it was necessary to confer on Congress the power ultimately to regulate the times, places and manner of selecting Representatives,[71] in order to forestall the over-represented counties' securing themselves a similar over-representation in the national councils. The example of South Carolina, where Charleston's overrepresentation was a continuing bone of contention between the tidewater and the back-country, was cited by Madison in the Virginia Convention and by King in the Massachusetts Convention, in support of the same power, and King also spoke of the extreme numerical inequality arising from Connecticut's town-representation system.[72]

Such inequalities survived the constitutional period. The United States Constitution itself did not largely adopt the principle of numbers. Apportionment of the national legislature among the States was one of the most difficult problems for the Convention;[73] its solution—involving State representation in the Senate[74] and the three-fifths compromise in the House[75]—left neither chamber apportioned proportionately to population. Within the States, electoral power continued to be allotted

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[68] Carpenter 48–49, 54; Griffith 26, 28–29; Luce 339–340.

[69] Carpenter 87; Griffith 26–29, 31.

[70] II Farrand, Records of the Federal Convention (1911), 241.

[71] The power was provided. Art. I, § 4, cl. 1.

[72] III Elliot's Debates (2d ed. 1891), 367; II *id.*, at 50–51.

[73] See Madison, in I Farrand, *op. cit., supra*, note 70, at 321: "The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable."

[74] See The Federalist, No. 62 (Wright ed. 1961), at 408–409.

[75] See The Federalist, No. 54, *id.*, at 369–374.

to favor the tidewater.[16] Jefferson, in his Notes on Virginia, recorded the "very unequal" representation there: individual counties differing in population by a ratio of more than seventeen to one elected the same number of representatives, and those nineteen thousand of Virginia's fifty thousand men who lived between the falls of the rivers and the sea-coast returned half the State's senators and almost half its delegates.[17] In South Carolina in 1790, the three lower districts, with a white population of less than twenty-nine thousand elected twenty senators and seventy assembly members; while in the uplands more than one hundred and eleven thousand white persons elected seventeen senators and fifty-four assemblymen.[18]

In the early nineteenth century, the demands of the interior became more insistent. The apportionment quarrel in Virginia was a major factor in precipitating the calling of a constitutional convention in 1829. Bitter animosities racked the convention, threatening the State with disunion. At last a compromise which gave the three hundred and twenty thousand people of the west thirteen senators, as against the nineteen senators returned by the three hundred sixty-three thousand people of the east, commanded agreement. It was adopted at the polls but left the western counties so dissatisfied that there were threats of revolt and realignment with the State of Maryland.[19]

Maryland, however, had her own numerical disproportions. In 1820, one representative vote in Calvert County

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[16] Carpenter 130.

[17] Jefferson, Notes on the State of Virginia (Peden ed. 1955), 118–119. See also II Writings of Thomas Jefferson (Memorial ed. 1903), 160–162.

[18] Carpenter 139–140.

[19] Griffith 102–104.

was worth five in Frederick County, and almost two hundred thousand people were represented by eighteen members, while fifty thousand others elected twenty.[80] This was the result of the county-representation system of allotment. And, except for Massachusetts which, after a long struggle, did adopt representation by population at the mid-century, a similar town-representation principle continued to prevail in various forms throughout New England, with all its attendant, often gross inequalities.[81]

3. *The States at the time of ratification of the Fourteenth Amendment, and those later admitted.* The several state conventions throughout the first half of the nineteenth century were the scenes of fierce sectional and party strifes respecting the geographic allocation of representation.[82] Their product was a wide variety of apportionment methods which recognized the element of population in differing ways and degrees. Particularly pertinent to appraisal of the contention that the Fourteenth Amendment embodied a standard limiting the freedom of the States with regard to the principles and bases of local legislative apportionment is an examination of the apportionment provisions of the thirty-three states which ratified the Amendment between 1866 and 1870, at their respective times of ratification. These may be considered in two groups: (A) the ratifying States other than the ten Southern States whose constitutions, at the time of ratification or shortly thereafter, were the work of the Reconstruction Act conventions;[83] and

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[80] Griffith 104–105.

[81] Luce 343–350. Bowen, *supra*, note 25, at 17–18, records that in 1824 Providence County, having three-fifths of Rhode Island's population elected only twenty-two of its seventy-two representatives, and that the town of Providence, more than double the size of Newport, had half Newport's number of representatives.

[82] Carpenter 130–137; Luce 364–367; Griffith 116–117.

[83] See 14 Stat. 428; 15 Stat. 2, 14, 41.

(B) the ten Reconstruction-Act States. All thirty-three are significant, because they demonstrate how unfounded is the assumption that the ratifying States could have agreed on a standard apportionment theory or practice, and how baseless the suggestion that by voting for the Equal Protection Clause they sought to establish a test mold for apportionment which—if appellants' argument is sound—struck down *sub silentio* not a few of their own state constitutional provisions. But the constitutions of the ten Reconstruction-Act States have an added importance, for it is scarcely to be thought that the Congress which was so solicitous for the adoption of the Fourteenth Amendment as to make the readmission of the late rebel States to Congress turn on their respective ratifications of it, would have approved constitutions which—again, under appellants' theory—contemporaneously offended the Amendment.

A. Of the twenty-three ratifying States of the first group, seven or eight had constitutions which demanded or allowed apportionment of both houses on the basis of population,[84] unqualifiedly or with only qualifications respecting the preservation of local boundaries.[85] Three

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[84] Various indices of population were employed among the States which took account of the factor of numbers. Some counted all inhabitants, *e. g.*, N. J. Const., 1844, Art. IV, § 3; some, only white inhabitants, *e. g.*, Ill. Const., 1848, Art. III, § 8; some, male inhabitants over twenty-one, *e. g.*, Ind. Const., 1851, Art. IV, §§ 4–5; some, qualified voters, *e. g.*, Tenn. Const., 1834, Art. II, §§ 4 to 6; some excluded aliens, *e. g.*, N. Y. Const., 1846, Art. III, §§ 4, 5 (and untaxed persons of color); some excluded untaxed Indians and military personnel, *e. g.*, Neb. Const., 1866–1867, Art. II, § 3. For present purposes these differences, although not unimportant as revealing fundamental divergences in representation theory, will be disregarded.

[85] Ore. Const., 1857, Art. IV, §§ 5, 6, 7; Ill. Const., 1848, Art. III, §§ 8, 9; Ind. Const., 1851, Art. IV, §§ 4, 5, 6; Minn. Const., 1857,

more apportioned on what was essentially a population base, but provided that in one house counties having a specified fraction of a ratio—a moiety or two-thirds—should have a representative.[86] Since each of these three States limited the size of their chambers, the fractional rule could operate—and, at least in Michigan, has in fact operated [87]—to produce substantial numerical inequalities

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Art. IV, § 2; Wis. Const., 1848, Art. IV, §§ 3 to 5; Mass. Const., 1780, Amends. XXI, XXII; Neb. Const., 1866–1867, Art. II, § 3. All of these but Minnesota made provision for periodic reapportionment. Nevada's Constitution of 1864, Art. XV, § 13, provided that the federal censuses and interim state decennial enumerations should serve as the bases of representation for both houses, but did not expressly require either numerical equality or reapportionment at fixed intervals.

Several of these constitutions contain provisions which forbid splitting counties or which otherwise require recognition of local boundaries. See, *e. g.*, the severe restriction in Ill. Const., 1848, Art. III, § 9. Such provisions will almost inevitably produce numerical inequalities. See, for example, University of Oklahoma, Bureau of Government Research, Legislative Apportionment in Oklahoma (1956), 21–23. However, because their effect in this regard will turn on idiosyncratic local factors, and because other constitutional provisions are a more significant source of inequality, these provisions are here disregarded.

[86] Tenn. Const., 1834, Art. II, §§ 4 to 6 (two-thirds of a ratio entitles a county to one representative in the House); W. Va. Const., 1861–1863, Art. IV, §§ 4, 5, 7, 8, 9 (one-half of a ratio entitles a county to one representative in the House); Mich. Const., 1850, Art. IV, §§ 2 to 4 (one-half of a ratio entitles each county thereafter organized to one representative in the House). In Oregon and Iowa a major-fraction rule applied which gave a House seat not only to counties having a moiety of a single ratio, but to all counties having more than half a ratio in excess of the multiple of a ratio. Ore. Const., 1857, Art. IV, § 6, note 85, *supra*; Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37, note 89, *infra*.

[87] See Bone, States Attempting to Comply with Reapportionment Requirements, 17 Law & Contemp. Prob. 387, 391 (1952).

in favor of the sparsely populated counties.[88] Iowa favored her small counties by the rule that no more than four counties might be combined in a representative district,[89] and New York and Kansas compromised population and county-representation principles by assuring every county, regardless of the number of its inhabitants, at least one seat in their respective Houses.[90]

Ohio and Maine recognized the factor of numbers by a different device. The former gave a House representative to each county having half a ratio, two representatives for a ratio and three quarters, three representatives for three ratios, and a single additional representative for each additional ratio.[91] The latter, after apportioning among counties on a population base, gave each town of fifteen hundred inhabitants one representative, each town of three thousand, seven hundred and fifty inhabitants two representatives, and so on in increasing intervals to twenty-six thousand, two hundred and fifty inhabitants—towns of that size or larger receiving the maximum permitted number of representatives: seven.[92] The departure from numerical equality under these systems is apparent: in Maine, assuming the incidence of towns in

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[88] It also appears, although the section is not altogether clear, that the provisions of West Virginia's Constitution controlling apportionment of senators would operate in favor of the State's less populous regions by limiting any single county to a maximum of two senators. W. Va. Const., 1861–1863, Art. IV, § 4.

[89] Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37.

[90] N. Y. Const., 1846, Art. III, §§ 4, 5 (except Hamilton County); Kan. Const., 1859, Art. 2, § 2; Art. 10. The Kansas provisions require periodic apportionment based on censuses, but do not in terms demand equal districts.

[91] Ohio Const., 1851, Art. XI, §§ 1 to 5. See Art. XI, §§ 6 to 9 for Senate apportionment.

[92] Me. Const., 1819, Art. IV, Pt. First, §§ 2, 3. See Art. IV, Pt. Second, § 2 for Senate apportionment based on numbers.

all categories, representative ratios would differ by factors of two and a half to one, at a minimum. Similarly, Missouri gave each of its counties, however small, one representative, two representatives for three ratios, three representatives for six ratios, and one additional representative for each three ratios above six.[95] New Hampshire allotted a representative to each town of one hundred and fifty ratable male polls of voting age and one more representative for each increment of three hundred above that figure;[96] its Senate was not apportioned by population but among districts based on the proportion of direct taxes paid.[97] In Pennsylvania, the basis of apportionment in both houses was taxable inhabitants; and in the House every county of at least thirty-five hundred taxables had a representative, nor could more than three counties be joined in forming a representative district; while in the Senate no city or county could have more than four of the State's twenty-five to thirty-three senators.[98]

Finally, four States apportioned at least one House with no regard whatever to population. In Connecticut[99] and Vermont[100] representation in the House was on a town basis; Rhode Island gave one senator to each of its towns or cities,[99] and New Jersey, one to each of its counties.[100]

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[95] Mo. Const., 1865, Art. IV, §§ 2, 7, 8. See Art. IV, §§ 4 to 8 for Senate apportionment based on numbers.

[96] Towns smaller than one hundred and fifty, *if* so situated that it was "very inconvenient" to join them to other towns for voting purposes, might be permitted by the legislature to send a representative.

[97] N. H. Const., 1792, Pt. Second, §§ IX to XI; Pt. Second, § XXVI.

[98] Pa. Const., 1838, as amended, Art. I, §§ 4, 6, 7.

[99] Conn. Const., 1818, Art. Third, § 3.

[100] Vt. Const., 1793, c. II, § 7.

[99] R. I. Const., 1842, Art. VI, § 1.

[100] N. J. Const., 1844, Art. IV, § 2, cl. One.

Nor, in any of these States, was the other house apportioned on a strict principle of equal numbers: Connecticut gave each of its counties a minimum of two senators [101] and Vermont, one; [102] New Jersey assured each county a representative; [103] and in Rhode Island, which gave at least one representative to each town or city, no town or city could have more than one-sixth of the total number in the House.[104]

B. Among the ten late Confederate States affected by the Reconstruction Acts, in only four did it appear that apportionment of both state legislative houses would or might be based strictly on population.[105] In North Carolina,[106] South Carolina,[107] Louisiana,[108] and Alabama,[109] each county (in the case of Louisiana, each parish) was assured at least one seat in the lower house irrespective of numbers—a distribution which exhausted, respectively,

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[101] Conn. Const., 1818, Amend. II.

[102] Vt. Const., 1793, Amend. 23.

[103] N. J. Const., 1844, Art. IV, § 3, cl. One.

[104] R. I. Const., 1842, Art. V, § 1.

[105] Ark. Const., 1868, Art. V, §§ 8, 9; Va. Const., 1864, Art. IV, § 6 (this constitution was in effect when Virginia ratified the Fourteenth Amendment); Va. Const., 1870, Art. V, § 4 (this was Virginia's Reconstruction-Act convention constitution); Miss. Const., 1868, Art. IV, §§ 33 to 35; Tex. Const., 1868, Art. III, §§ 11, 34. The Virginia Constitutions and Texas' provisions for apportioning its lower chamber do not in terms require equality of numbers, although they call for reapportionment following a census. In Arkansas, the legislature was authorized, but not commanded, to reapportion periodically; it is not clear that equality was required.

[106] N. C. Const., 1868, Art. II, §§ 6, 7. See Art. II, § 5 for Senate apportionment based on numbers.

[107] S. C. Const., 1868, Art. I, § 34; Art. II, §§ 4 to 6.

[108] La. Const., 1868, Tit. II, Arts. 20, 21. See Tit. II, Arts. 28 to 30 for Senate apportionment based on numbers.

[109] Ala. Const., 1867, Art. VIII, § 1. See Art. VIII, § 3 for Senate apportionment based on numbers.

on the basis of the number of then-existing counties, three-quarters, one-quarter, two-fifths and three-fifths of the maximum possible number of representatives, before a single seat was available for assignment on a population basis; and in South Carolina, moreover, the Senate was composed of one member elected from each county, except that Charleston sent two.[110] In Florida's House, each county had one seat guaranteed and an additional seat for every thousand registered voters up to a maximum of four representatives;[111] while Georgia, whose Senate seats were distributed among forty-four single-member districts each composed of three contiguous counties,[112] assigned representation in its House as follows: three seats to each of the six most populous counties, two to each of the thirty-one next most populous, one to each of the remaining ninety-five.[113] As might be expected, the one-representative-per-county-minimum pattern has proved incompatible with numerical equality,[114] and Georgia's

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[110] S. C. Const., 1868, Art. II, § 8.

[111] Fla. Const., 1868, Art. XIV, par. 1. See Art. XIV, par. 2, for Senate apportionment.

[112] Ga. Const., 1868, Art. III, § 2. The extent of legislative authority to alter these districts is unclear, but it appears that the structure of three contiguous counties for each of forty-four districts is meant to be permanent.

[113] Ga. Const., 1868, Art. III, § 3. The extent of legislative authority to alter the apportionment is unclear, but it appears that the three-tiered structure is meant to be permanent.

[114] See, *e. g.*, Durfee, Apportionment of Representation in the Legislature: A Study of State Constitutions, 43 Mich. L. Rev. 1091, 1097 (1945); Short, States That Have Not Met Their Constitutional Requirements, 17 Law & Contemp. Prob. 377 (1952); Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Prob. 364, 370 (1952). For an excellent case study of numerical inequalities deriving solely from a one-member-per-county minimum provision in Ohio, see Aumann, Rural Ohio Hangs On, 46 Nat. Mun. Rev. 189, 191–192 (1957).

county-clustering system has produced representative-ratio disparities, between the largest and smallest counties, of more than sixty to one.[115]

C. The constitutions[116] of the thirteen States which Congress admitted to the Union after the ratification of the Fourteenth Amendment showed a similar pattern. Six of them required or permitted apportionment of both houses by population, subject only to qualifications concerning local boundaries.[117] Wyoming, apportioning by population, guaranteed to each of its counties at least one seat in each house,[118] and Idaho, which prescribed (after the first legislative session) that apportionment should be "as may be provided by law," gave each county at least one representative.[119] In Oklahoma, House members were apportioned among counties so as to give one

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[115] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 574 (1955). (This is the effect of a later Georgia constitutional provision, Ga. Const., 1945, § 2-1501, substantially similar to that of 1868.) The same three-tiered system has subsequently been adopted in Florida, Fla. Const., 1885, Art. VII, §§ 3, 4, where its effects have been inequalities of the order of eighty to one. Dauer and Kelsay, *supra*, at 575, 587.

[116] The constitutions discussed are those under which the new States entered the Union.

[117] Colo. Const., 1876, Art. V, §§ 45, 47; N. D. Const., 1889, Art. 2, §§ 29, 35; S. D. Const., 1889, Art. III, § 5; Wash. Const., 1889, Art. II, §§ 3, 6; Utah Const., 1895, Art. IX, §§ 2, 4; N. M. Const., 1911, Art. IV, following § 41. The Colorado and Utah Constitutions provide for reapportionment "according to ratios to be fixed by law" after periodic census and enumeration. In New Mexico the legislature is authorized, but not commanded, to reapportion periodically. North Dakota does not in terms demand equality in House representation; members are to be assigned among the several senatorial districts, which are of equal population.

[118] Wyo. Const., 1889, Art. III, Legislative Department, § 3; Art. III, Apportionment, §§ 2, 3.

[119] Idaho Const., 1889, Art. III, § 4.

seat for half a ratio, two for a ratio and three quarters, and one for each additional ratio up to a maximum of seven representatives per county.[120] Montana required reapportionment of its House on the basis of periodic enumerations according to ratios to be fixed by law [121] but its counties were represented as counties in the Senate, each county having one senator.[122] Alaska [123] and Hawaii [124] each appointed a number of senators among constitutionally fixed districts; their respective Houses were to be periodically reapportioned by population, subject to a moiety rule in Alaska [125] and to Hawaii's guarantee of one representative to each of four constitutionally designated areas.[126] The Arizona Constitution assigned representation to each county in each house, giving one or two senators and from one to seven representatives to each, and making no provision for reapportionment.[127]

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[120] Okla. Const., 1907, Art. V, § 10 (b) to (j). See Art. V, § 9 (a), (b) for Senate apportionment based on numbers.

[121] Mont. Const., 1889, Art. VI, §§ 2, 3.

[122] Mont. Const., 1889, Art. V, § 4; Art. VI, § 4. The effective provisions are, first, that there shall be no more than one senator from each county, and, second, that no senatorial district shall consist of more than one county.

[123] Alaska Const., 1956, Art. VI, § 7; Art. XIV, § 2. The exact boundaries of the districts may be modified to conform to changes in House districts, but their numbers of senators and their approximate perimeters are to be preserved.

[124] Hawaii Const., 1950, Art. III, § 2.

[125] Alaska Const., 1956, Art. VI, §§ 3, 4, 6. The method of equal proportions is used.

[126] Hawaii Const., 1950, Art. III, § 4. The method of equal proportions is used, and, for sub-apportionment within the four "basic" areas, a form of moiety rule obtains.

[127] Ariz. Const., 1910, Art. IV, Pt. 2, § 1. On the basis of 1910 census figures, this apportionment yielded, for example, a senatorial-ratio differential of more than four to one between Mohave and Cochise or between Mohave and Maricopa Counties. II Thirteenth Census of the United States (1910), 71–73.

4. *Contemporary apportionment.* Detailed recent studies are available to describe the present-day constitutional and statutory status of apportionment in the fifty States.[128] They demonstrate a decided twentieth-century trend away from population as the exclusive base of representation. Today, only a dozen state constitutions provide for periodic legislative reapportionment of both houses by a substantially unqualified application of the population standard,[129] and only about a dozen more prescribe such reapportionment for even a single chamber. "Specific provision for county representation in at least one house of the state legislature has been increasingly adopted since the end of the 19th century. . . ."[130] More than twenty States now guarantee each county at least one seat in one of their houses regardless of population, and in nine others county or town units are given equal representation in one legislative branch, whatever the number of each unit's inhabitants. Of course, numerically considered, "These provisions invariably result in over-representation of the least populated areas. . . ."[131] And in an effort to curb the political dominance of metropolitan regions, at least ten States now limit the maximum entitlement of any single county (or, in some cases, city)

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[128] The pertinent state constitutional provisions are set forth in tabular form in XIII Book of the States (1960–1961), 54–58; and Greenfield, Ford and Emery, Legislative Reapportionment: California in National Perspective (University of California, Berkeley, 1959), 81–85. An earlier treatment now outdated in several respects but still useful is Durfee, *supra*, note 114. See discussions in Harvey, *supra*, note 114; Shull, Political and Partisan Implications of State Legislative Apportionment, 17 Law & Contemp. Prob. 417, 418–421 (1952).

[129] Nebraska's unicameral legislature is included in this count.

[130] Greenfield, Ford and Emery, *supra*, note 128, at 7.

[131] Harvey, *supra*, note 114, at 367. See Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277, 282–283 (1956).

in one legislative house—another source of substantial numerical disproportion.[132]

Moreover, it is common knowledge that the legislatures have not kept reapportionment up to date, even where state constitutions in terms require it.[133] In particular, the pattern of according greater per capita representation to rural, relatively sparsely populated areas—the same pattern which finds expression in various state constitutional provisions,[134] and which has been given effect in England and elsewhere[135]—has, in some of the States, been made the law by legislative inaction in the face of

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[132] See, *e. g.*, Mather and Ray, The Iowa Senatorial Districts Can Be Reapportioned—A Possible Plan, 39 Iowa L. Rev. 535, 536–537 (1954).

[133] See, *e. g.*, Walter, Reapportionment and Urban Representation, 195 Annals of the American Academy of Political and Social Science 11, 12–13 (1938); Bone, *supra*, note 87. Legislative inaction and state constitutional provisions rejecting the principle of equal numbers have both contributed to the generally prevailing numerical inequality of representation in this country. Compare Walter, *supra*, with Baker, One Vote, One Value, 47 Nat. Mun. Rev. 16, 18 (1958).

[134] See, *e. g.*, Griffith 116–117; Luce 364–367, 370; Merriam, American Political Ideas (1929), 244–245; Legislation, Apportionment of the New York State Senate, 31 St. John's L. Rev. 335, 341–342 (1957).

[135] In 1947, the Boundary Commission for England, ". . . impressed by the advantages of accessibility [that large compact urban regions] . . . enjoy over widely scattered rural areas . . . came to the conclusion that they could conveniently support electorates in excess of the electoral quota, and would in the majority of cases prefer to do so rather than suffer severance of local unity for parliamentary purposes,"—that "in general urban constituencies could more conveniently support large electorates than rural constituencies . . . ." Initial Report of the Boundary Commission for England [Cmd. 7260] (1947), 5. See also Mackenzie 110–111; De Grazia, General Theory of Apportionment, 17 Law & Contemp. Prob. 256, 261–262 (1952).

pop lation shifts.[136] Throughout the country, urban and suburban areas tend to be given higher representation ratios than do rural areas.[137]

The stark fact is that if among the numerous widely varying principles and practices that control state legislative apportionment today there is any generally prevailing feature, that feature is geographic inequality in relation to the population standard.[138] Examples could be endlessly multiplied. In New Jersey, counties of

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[136] See Walter, *supra*, note 133; Walter, Reapportionment of State Legislative Districts, 37 Ill. L. Rev. 20, 37–38 (1942). The urban-rural conflict is often the core of apportionment controversy. See Durfee, *supra*, note 114, at 1093–1094; Short, *supra*, note 114, at 381.

[137] Baker, Rural Versus Urban Political Power (1955), 11–19; MacNeil, Urban Representation in State Legislatures, 18 State Government 59 (1945); United States Conference of Mayors, Government Of the People By the People, For the People (ca. 1947).

[138] See, in addition to the authorities cited in notes 130, 131, 136 and 137, *supra*, and 140 to 144, *infra*, (all containing other examples than those remarked in text), Hurst, The Growth of American Law, The Law Makers (1950), 41–42; American Political Science Assn., Committee on American Legislatures, American State Legislatures (Zeller ed. 1954), 34–35; Gosnell, Democracy, The Threshold of Freedom (1948), 179–181; Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1059–1064 (1958); Friedman, Reapportionment Myth, 49 Nat. Civ. Rev. 184, 185–186 (1960); 106 Cong. Rec. 13827–13842 (daily ed., June 29, 1960) (remarks of Senator Clark and supporting materials); H. R. Rep. No. 2533, 85th Cong., 2d Sess. 24; H. R. Doc. No. 198, 84th Cong., 1st Sess. 38–40; Hadwiger, Representation in the Missouri General Assembly, 24 Mo L. Rev. 178, 180–181 (1959); Hamilton, Beardsley and Coats, Legislative Reapportionment in Indiana; Some Observations and a Suggestion, 35 Notre Dame Law. 368, 368–370 (1960); Corter, Pennsylvania Ponders Apportionment, 32 Temple L. Q. 279, 283–288 (1959). Concerning the classical gerrymander, see Griffith, passim; Luce 395–404; Brooks, Political Parties and Electoral Problems (3d ed. 1933), 472–481. For foreign examples of numerical disproportion, see Hogan, Election and Representation (1945), 95; Finer, Theory and Practice of Modern Government (Rev. ed. 1949), 551–552

thirty-five thousand and of more than nine hundred and five thousand inhabitants respectively each have a single senator.[139] Representative districts in Minnesota range from 7,290 inhabitants to 107,246 inhabitants.[140] Ratios of senatorial representation in California vary as much as two hundred and ninety-seven to one.[141] In Oklahoma, the range is ten to one for House constituencies and roughly sixteen to one for Senate constituencies.[142] Colebrook, Connecticut—population 592—elects two House representatives; Hartford—population 177,397—also elects two.[143] The first, third and fifth of these examples are the products of constitutional provisions which subordinate population to regional considerations in apportionment; the second is the result of legislative inaction; the fourth derives from both constitutional and legislative sources. A survey made in 1955, in sum, reveals that less than thirty percent of the population inhabit districts sufficient to elect a House majority in thirteen States and a Senate majority in nineteen States.[144] These figures show more than individual variations from a generally accepted standard of electoral equality. They show that there is not—as there has never been—a standard by

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[139] Baker, *supra*, note 137, at 11. Recent New Jersey legislation provides for reapportionment of the State's lower house by executive action following each United States census subsequent to that of 1960. N. J. Laws 1961, c. 1. The apportionment is to be made on the basis of population, save that each county is assured at least one House seat. In the State's Senate, however, by constitutional command, each county elects a single senator, regardless of population. N. J. Const., 1947, Art. IV, § II, par. 1.

[140] Note, 42 Minn. L. Rev. 617, 618-619 (1958).

[141] Greenfield, Ford and Emery, *supra*, note 128, at 3.

[142] University of Oklahoma, Bureau of Government Research, The Apportionment Problem in Oklahoma (1959), 16-29.

[143] 1 Labor's Economic Rev. 89, 96 (1956).

[144] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 572, 574 (1955).

which the place of equality as a factor in apportionment can be measured.

Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself. Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.[145]

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[145] See the Second Schedule to the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, as amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26, § 2, and the English experience described in text at notes 50 to 61, *supra*. See also the Report of the Assembly Interim Committee on Elections and Reapportionment, California Assembly (1951) (hereafter, California Committee Report), 37: "The geographic—the socio-economic—the desires of the people—the desires of the elected officeholders—the desires of political parties—all these can and do legitimately operate not only within the framework of the 'relatively equal in population districts' factor, but also within the factors of contiguity and compactness. The county and Assembly line legal restrictions operate outside the framework of theoretically 'equal in population districts.' All the factors might conceivably have the same weight in one situation; in another, some factors might be considerably more important than others in making the final determination." A Virginia legislative committee adverted to ". . . many difficulties such as natural topographical barriers, divergent business and social interests, lack of communication by rail or highway, and the disinclinations of communities to breaking up political ties of long standing, resulting in some cases of districts requesting to remain with populations more than their averages rather than have their equal

Legislative responses throughout the country to the reapportionment demands of the 1960 Census have glaringly confirmed that these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit. And this is the more so true because in every strand of this complicated, intricate web of values meet the contending forces of partisan politics.[146] The practical significance of apportionment is that the next election results may differ because of it. Apportionment battles are overwhelmingly party or intra-party contests.[147] It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them.[148]

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representation with the changed conditions." Report of the Joint Committee on the Re-apportionment of the State into Senatorial and House Districts, Virginia General Assembly, House of Delegates, H. Doc. No. 9 (1922), 1-2. And the Tennessee State Planning Commission, concerning the problem of congressional redistricting in 1950, spoke of a "tradition [which] relates to the sense of belonging—loyalties to groups and items of common interest with friends and fellow citizens of like circumstance, environment or region." Tennessee State Planning Commission, Pub. No. 222, Redistricting for Congress (1950), First page.

[146] See, *e. g.*, California Committee Report, at 52.

". . . [T]he reapportionment process is, by its very nature, political. . . . There will be politics in reapportionment as long as a representative form of government exists . . . .

"It is impossible to draw a district boundary line without that line's having some political significance. . . ."

[147] See, *e. g.*, Celler, Congressional Apportionment—Past, Present, and Future, 17 Law & Contemp. Prob. 268 (1952), speaking of the history of congressional apportionment:

". . . A mere reading of the debates [from the Constitutional Convention down to contemporary Congresses] on this question of apportionment reveals the conflicting interests of the large and small states and the extent to which partisan politics permeates the entire problem."

[148] See Standards for Congressional Districts (Apportionment), Hearings Before Subcommittee No. 2 of the Committee on the

IV.

Appellants, however, contend that the federal courts may provide the standard which the Fourteenth Amendment lacks by reference to the provisions of the constitution of Tennessee. The argument is that although the same or greater disparities of electoral strength may be suffered to exist immune from federal judicial review in States where they result from apportionment legislation consistent with state constitutions, the Tennessee legislature may not abridge the rights which, on its face, its own constitution appears to give, without by that act denying equal protection of the laws. It is said that the law of Tennessee, as expressed by the words of its written constitution, has made the basic choice among policies in favor of representation proportioned to population, and that it is no longer open to the State to allot its voting power on other principles.

This reasoning does not bear analysis. Like claims invoking state constitutional requirement have been rejected here and for good reason. It is settled that whatever federal consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the

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Judiciary, House of Representatives, 86th Cong., 1st Sess. 23, concerning a proposed provision for judicial enforcement of certain standards in the laying out of districts:

"Mr. KASEM. You do not think that that [a provision embodying the language: 'in as compact form as practicable'] might result in a decision depending upon the political inclinations of the judge?

"Mr. CELLER. Are you impugning the integrity of our Federal judiciary?

"Mr. KASEM. No; I just recognize their human frailties."

For an instance of a court torn, in fact or fancy, over the political issues involved in reapportionment, see *State ex rel. Lashly* v. *Becker*, 290 Mo. 560, 235 S. W. 1017, and especially the dissenting opinion of Higbee, J., at 613, 235 S. W. at 1037.

State's fundamental law. *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362. And see *Castillo* v. *McConnico*, 168 U. S. 674; *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 599, 608–609; *Owensboro Waterworks Co.* v. *Owensboro*, 200 U. S. 38; *Hebert* v. *Louisiana*, 272 U. S. 312, 316–317; *Snowden* v. *Hughes*, 321 U. S. 1, 11. Appellants complain of a practice which, by their own allegations, has been the law of Tennessee for sixty years. They allege that the apportionment act of 1901 created unequal districts when passed and still maintains unequal districts. They allege that the Legislature has since 1901 purposefully retained unequal districts. And the Supreme Court of Tennessee has refused to invalidate the law establishing these unequal districts. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S. W. 2d 40; appeal dismissed here in 352 U. S. 920. In these circumstances, what was said in the *Browning* case, *supra*, at 369, clearly governs this case:

> ". . . Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . [T]he Equal Protection Clause is not a command of candor. . . ."

Tennessee's law and its policy respecting apportionment are what 60 years of practice show them to be, not what appellants cull from the unenforced and, according to its own judiciary, unenforceable words of its Constitution. The statute comes here on the same footing, therefore, as would the apportionment laws of New Jersey, California or Connecticut,[149] and is unaffected by its supposed repugnance to the state constitutional language on which appellants rely.[150]

In another aspect, however, the *Kidd* v. *McCanless* case, *supra*, introduces a factor peculiar to this litigation, which only emphasizes the duty of declining the exercise of federal judicial jurisdiction. In all of the apportionment cases which have come before the Court, a consideration which has been weighty in determining their non-justiciability has been the difficulty or impossibility of devising effective judicial remedies in this class of case. An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable. A declaration devoid

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[149] See text at notes 139–143, *supra*.

[150] Decisions of state courts which have entertained apportionment cases under their respective state constitutions do not, of course, involve the very different considerations relevant to federal judicial intervention. State-court adjudication does not involve the delicate problems of federal-state relations which would inhere in the exercise of federal judicial power to impose restrictions upon the States' shaping of their own governmental institutions. Moreover, state constitutions generally speak with a specificity totally lacking in attempted utilization of the generalities of the Fourteenth Amendment to apportionment matters. Some expressly commit apportionment to state judicial review, see, *e. g.*, N. Y. Const., 1938, Art. III, § 5, and even where they do not, they do precisely fix the criteria for judicial judgment respecting the allocation of representative strength within the electorate. See, *e. g.*, *Asbury Park Press, Inc.*, v. *Woolley*, 33 N. J. 1, 161 A. 2d 705.

of implied compulsion of injunctive or other relief would be an idle threat.[181] Surely a Federal District Court could not itself remap the State: the same complexities which impede effective judicial review of apportionment *a fortiori* make impossible a court's consideration of these imponderables as an original matter. And the choice of elections at large as opposed to elections by district, however unequal the districts, is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts.

In Tennessee, moreover, the *McCanless* case has closed off several among even these unsatisfactory and dangerous modes of relief. That case was a suit in the state courts attacking the 1901 Reapportionment Act and seeking a declaration and an injunction of the Act's enforcement or, alternatively, a writ of mandamus compelling state election officials to hold the elections at large, or, again alternatively, a decree of the court reapportioning the State. The Chancellor denied all coercive relief, but entertained the suit for the purpose of rendering a declaratory judgment. It was his view that despite an invalidation of the statute under which the present legislature was elected, that body would continue to possess *de facto* authority to reapportion, and that therefore the maintaining of the suit did not threaten the disruption of the government. The Tennessee Supreme Court agreed that no coercive relief could be granted; in particular, it said, "There is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn., at 277, 292 S. W. 2d, at 42. Thus, a legislature elected at

[181] Appellants' suggestion that, although no relief may need be given, jurisdiction ought to be retained as a "spur" to legislative action does not merit discussion.

large would not be the legally constituted legislative authority of the State. The court reversed, however, the Chancellor's determination to give declaratory relief, holding that the ground of demurrer which asserted that a striking down of the statute would disrupt the orderly process of government should have been sustained:

> "(4) It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the *de facto* doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only not have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly.
>
> . . . . . .
>
> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." *Id.*, at 281–282, 292 S. W. 2d, at 44.

A federal court enforcing the Federal Constitution is not, to be sure, bound by the remedial doctrines of the state courts. But it must consider as pertinent to the propriety or impropriety of exercising its jurisdiction those state-law effects of its decree which it cannot itself control. A federal court cannot provide the authority requisite to make a legislature the proper governing body of the State of Tennessee. And it cannot be doubted that the strik-

ing down of the statute here challenged on equal protection grounds, no less than on grounds of failure to reapportion decennially, would deprive the State of all valid apportionment legislation and—under the ruling in *McCanless*—deprive the State of an effective law-based legislative branch. Just such considerations, among others here present, were determinative in *Luther* v. *Borden* and the Oregon initiative cases.[152]

Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action. The judgment of the District Court, in dismissing the complaint for failure to state a claim on which relief can be granted, should therefore be affirmed.

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[152] See note 24, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. | On Appeal From the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Dissenting opinion of Mr. Justice Harlan, whom Mr. Justice Frankfurter joins.

The dissenting opinion of Mr. Justice Frankfurter, in which I join, demonstrates the abrupt departure the majority makes from judicial history by putting the federal courts into this area of state concerns—an area which, in this instance, the Tennessee state courts themselves have refused to enter.

It does not detract from his opinion to say that the panorama of judicial history it unfolds, though evincing a steadfast underlying principle of keeping the federal courts out of these domains, has a tendency, because of variants in expression, to becloud analysis in a given case. With due respect to the majority, I think that has happened here.

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability," and "political question," there emerges a straightforward issue which, in my view, is determinative of this case. Does the complaint disclose a violation of a federal constitutional right, in other words, a claim over which a United States District Court would have jurisdiction under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice observes, seems to decide it "*sub silentio*." *Ante*, p. 11. However, in my

opinion, appellants' allegations, accepting all of them as true, do not, parsed down or as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. Accordingly, I believe the complaint should have been dismissed for "failure to state a claim upon which relief can be granted." Fed. Rules Civ. Proc., 12 (b)(6).

It is at once essential to recognize this case for what it is. The issue here relates not to a method of state electoral apportionment by which seats in the *federal* House of Representatives are allocated, but solely to the right of a State to fix the basis of representation in its *own* legislature. Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of "justiciability" or "political question" or any of the other considerations which in such cases as *Colegrove* v. *Green*, 328 U. S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of Congress. See also *Wood* v. *Broom*, 287 U. S. 1.

The appellants' claim in this case ultimately rests entirely on the Equal Protection Clause of the Fourteenth Amendment. It is asserted that Tennessee has violated the Equal Protection Clause by maintaining in effect a system of apportionment that grossly favors in legislative representation the rural sections of the State as against its urban communities. Stripped to its essentials the complaint purports to set forth three constitutional claims of varying breadth:

> (1) The Equal Protection Clause requires that each vote cast in state legislative elections be given approximately equal weight.

(2) Short of this, the existing apportionment of state legislators is so unreasonable as to amount to an arbitrary and capricious act of classification on the part of Tennessee Legislature, which is offensive to the Equal Protection Clause.

(3) In any event, the existing apportionment is rendered invalid under the Fourteenth Amendment because it flies in the face of the Tennessee Constitution.

For reasons given in MR. JUSTICE FRANKFURTER's opinion, *ante*, pp. 59–61, the last of these propositions is manifestly untenable, and need not be dealt with further. I turn to the other two.

I.

I can find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history, as shown by my Brother FRANKFURTER, but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of basically local concern.

In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government. It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that. To consider that we may ignore

the Tennessee Legislature's judgment in this instance because that body was the product of an asymmetrical electoral apportionment would in effect be to assume the very conclusion here disputed. Hence we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise, between competing political philosophies. The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise.

With respect to state tax statutes and regulatory measures, for example, it has been said that the "day is gone when this Court uses the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch. The Federal Constitution imposes no limitation on the form which a state government may take other than generally committing to the United States the duty to guarantee to every State "a Republican Form of Government." And, as my Brother FRANKFURTER so conclusively proves (*ante*, pp. 42–51), no intention to fix immutably the means of selecting representatives for state governments could have been in the minds of either the Founders or the draftsmen of the Fourteenth Amendment.

In short, there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. I would have thought this proposition settled by *MacDougall* v. *Green*, 335 U. S. 281, in which the Court observed (at

p. 283) that to "assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and reaffirmed by *South* v. *Peters*, 339 U. S. 276. A State's choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income. Both are legislative judgments entitled to equal respect from this Court.

II.

The claim that Tennessee's system of apportionment is so unreasonable as to amount to a capricious classification of voting strength stands up no better under dispassionate analysis.

The Court has said time and again that the Equal Protection Clause does not demand of state enactments either mathematical identity or rigid equality. *E. g., Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 527–528, and authorities there cited; *McGowan* v. *Maryland*, 366 U. S. 420, 425–426. All that is prohibited is "invidious discrimination" bearing no rational relation to any permissible policy of the State. *Williamson* v. *Lee Optical Co., supra*, at 489. And in deciding whether such discrimination has been practiced by a State, it must be borne in mind that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland, supra*. It is not inequality alone that calls for a holding of unconstitutionality; only if the inequality is based on an impermissible standard may this Court condemn it.

What then is the basis for the claim made in this case that the distribution of state senators and representatives is the product of capriciousness or of some constitutionally prohibited policy? It is not that Tennessee has arranged its electoral districts with a deliberate purpose to dilute

the voting strength of one race, cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339, or that some religious group is intentionally underrepresented. Nor is it a charge that the legislature has indulged in sheer caprice by allotting representatives to each county on the basis of a throw of the dice, or of some other determinant bearing no rational relation to the question of apportionment. Rather, the claim is that the State Legislature has unreasonably retained substantially the same allocation of senators and representatives as was established by statute in 1901, refusing to recognize the great shift in the population balance between urban and rural communities that has occurred in the meantime.

It is further alleged that even as of 1901 the apportionment was invalid, in that it did not allocate state legislators among the counties in accordance with the formula set out in Art. II, § 5, of the Tennessee Constitution. In support of this the appellants have furnished a Table which indicates that as of 1901 six counties were overrepresented and 11 were underrepresented. But that Table in fact shows nothing in the way of significant discrepancy; in the instance of each county it is only one representative who is either lacking or added. And it is further perfectly evident that the variations are attributable to nothing more than the circumstance that the then enumeration of voters resulted in fractional remainders with respect to which the precise formula of the Tennessee Constitution was in some instances slightly disregarded. Unless such *de minimis* departures are to be deemed of significance, these statistics certainly provide no substantiation for the charge that the 1901 apportionment was arbitrary and capricious. Indeed, they show the contrary.

Thus reduced to its essentials, the charge of arbitrariness and capriciousness rests entirely on the consistent refusal of the Tennessee Legislature over the past 60

years to alter a pattern of apportionment that was reasonable when conceived.

A Federal District Court is asked to say that the passage of time has rendered the 1901 apportionment obsolete to the point where its continuance becomes vulnerable under the Fourteenth Amendment. But is not this matter one that involves a classic legislative judgment? Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.

Indeed, I would hardly think it unconstitutional if a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities. A State may, after all, take account of the interests of its rural population in the distribution of tax burdens, *e. g.*, *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, and recognition of the special problems of agricultural interests has repeatedly been reflected in federal legislation, *e. g.*, Capper-Volstead Act, 42 Stat. 388; Agricultural Adjustment Act of 1938, 52 Stat. 31. Even the exemption of agricultural activities from state criminal statutes of otherwise general application has not been deemed offensive to the Equal Protection Clause. *Tigner* v. *Texas*, 310 U. S. 141. Does the Fourteenth Amendment impose a stricter limitation upon a State's apportionment of political respresentatives to its central government? I think not. These are matters of local policy, on the wisdom of which the federal judiciary is neither permitted nor qualified to sit in judgment.

The suggestion of my Brother FRANKFURTER that courts lack standards by which to decide such cases as

this, is relevant not only to the question of "justiciability," but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case. Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such a decision are basically matters appropriate only for legislative judgment. And so long as there exists a possible rational legislative policy for retaining an existing apportionment, such a legislative decision cannot be said to breach the bulwark against arbitrariness and caprice that the Fourteenth Amendment affords. Certainly, with all due respect, the facile arithmetical argument contained in Part II of my Brother CLARK's separate opinion (*ante*, pp. 3–9) provides no tenable basis for considering that there has been such a breach in this instance. (See the Appendix to this opinion.)

These conclusions can hardly be escaped by suggesting that capricious state action might be found were it to appear that a majority of the Tennessee legislators, in refusing to consider reapportionment, had been actuated by self-interest in perpetuating their own political offices or by other unworthy or improper motives. Since *Fletcher* v. *Peck*, 6 Cranch 87, was decided many years ago, it has repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators. *E. g., Arizona* v. *California*, 283 U. S. 423, 455 & n. 7. The function of the federal judiciary ends in matters of this kind once it appears, as I think it does here on the undisputed facts, that the state action complained of could have rested on some rational basis. (See the Appendix to this opinion.)

It is my view that the majority opinion has failed to point to any recognizable constitutional claim alleged in this complaint. Indeed, it is interesting to note that my Brother STEWART is at pains to disclaim for himself, and

to point out that the majority opinion does not suggest, that the Federal Constitution requires of the States any particular kind of electoral apportionment, still less that they must accord to each voter approximately equal voting strength. Concurring opinion, *ante*, pp. ——. But that being so, what, may it be asked, is left of this complaint? Surely the bare allegations that the existing Tennessee apportionment is "incorrect," "arbitrary," "obsolete" and "unconstitutional"—amounting to nothing more than legal conclusions—do not themselves save the complaint from dismissal. See *Snowden* v. *Hughes*, 321 U. S. 1; *Collins* v. *Hardyman*, 341 U. S. 651. Nor do those allegations shift to the appellees the burden of proving the *constitutionality* of this state statute; as is so correctly emphasized by my Brother STEWART (*ante*, p. 2), this Court has consistently held in cases arising under the Equal Protection Clause that " 'the burden of establishing the *constitutionality* of a statute rests on him who assails it,' *Metropolitan Ins. Co.* v. *Brownell*, 294 U. S. 581, 584." (Emphasis added.) Moreover, the appellants do not suggest that they could show at a trial anything beyond the matters previously discussed in this opinion, which add up to nothing in the way of a supportable constitutional challenge against this statute. And finally, the majority's failure to come to grips with the question whether the complaint states a claim cognizable under the Federal Constitution—an issue necessarily presented by appellee's motion to dismiss—does not of course furnish any ground for permitting this action to go to trial.

From a reading of the majority and concurring opinions one will not find it difficult to catch the premises that underlie this decision. The fact that the appellants have been unable to obtain political redress of their asserted grievances appears to be regarded as a matter which should lead the Court to stretch to find some basis for judi-

cial intervention. While the Equal Protection Clause is invoked, the opinion for the Court notably eschews explaining how, consonant with past decisions, the undisputed facts in this case can be considered to show a violation of that constitutional provision. The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other "malapportioning" States will quickly respond with appropriate political action, so that this Court need not be greatly concerned about the federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication. Whether dismissal of this case should have been for want of jurisdiction or, as is suggested in *Bell* v. *Hood*, 327 U. S. 678, 682–683, for failure of the complaint to state a claim upon which relief could be granted, the judgment of the District Court was correct.

In conclusion, it is appropriate to say that one need not agree, as a citizen, with what Tennessee has done or failed to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.

I would affirm.

APPENDIX.

The Inadequacy of Arithmetical Formulas as Measures of the Rationality of Tennessee's Apportionment.

Two of the three separate concurring opinions appear to concede that the Equal Protection Clause does not guarantee to each state voter a vote of approximately equal weight for the State Legislature. Whether the existing Tennessee apportionment is constitutional is recognized to depend only on whether it can find "any possible justification in rationality" (*ante*, p. 1); it is to be struck down only if "the discrimination here does not fit any pattern" (*ante*, p. 8).

One of the concurring opinions, that of my Brother Stewart, suggests no reasons which would justify a finding that the present distribution of state legislators is unconstitutionally arbitrary. The same is true of the majority opinion. My Brother Clark, on the other hand, concludes that "the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions" (*ante*, p. 4), solely on the basis of certain statistics presented in the text of his separate opinion and included in a more extensive Table appended thereto. In my view, that analysis is defective not only because the "total representation" formula set out in footnote 7 of the opinion (*ante*, p. 5), rests on faulty mathematical foundations, but, more basically, because the approach taken wholly ignores all other factors justifying a legislative determination of the sort involved in devising a proper apportionment for a State Legislature.

In failing to take any of such other matters into account and in focusing on a particular mathematical formula which, as will be shown, is patently unsound, my Brother Clark's opinion has, I submit, unwittingly served to bring into bas-relief the very reasons that support the view that this complaint does not state a claim on which relief could be granted. For in order to warrant holding a state electoral apportionment invalid under the Equal Protection

Clause, a court, in line with well-established constitutional doctrine, must find that *none* of the permissible policies and *none* of the possible formulas on which it might have been based could rationally justify particular inequalities.

I.

At the outset, it cannot be denied that the apportionment rules explicitly set out in the Tennessee Constitution are rational. These rules are based on the following obviously permissible policy determinations: (1) to utilize counties as electoral units; (2) to prohibit the division of any county in the composition of electoral districts; (3) to allot to each county that has a substantial voting population—at least two-thirds of the average voting population per county—a separate "direct representative"; (4) to create "floterial" districts (multicounty representative districts) made up of more than one county; and (5) to require that such districts be composed of adjoining counties.[1] Such a framework unavoidably

[1] The relevant provisions of the Tennessee Constitution are Art. II, §§ 5 and 6:

"Sec. 5. The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member.

"Sec. 6. The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed one-third the number of Representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members of the House of Representatives, shall be made up to such county or counties in the Senate as near as may be practicable. When a district is composed of two or more counties they shall be adjoining, and no counties shall be divided in forming a district."

leads to unreliable arithmetic inequalities under any mathematical formula whereby the counties' "total representation" is sought to be measured. It particularly results in egregiously deceptive disparities if the formula proposed in my Brother CLARK's opinion is applied.

That formula computes a county's "total representation" by adding (1) the number of "direct representatives" the county is entited to elect; (2) a fraction of any other seats in the Tennessee House which are allocated to that county jointly with one or more others in a "floterial district"; (3) triple the number of senators the county is entitled to elect alone; and (4) triple a fraction of any seats in the Tennessee Senate which are allocated to that county jointly with one or more others in a multicounty senatorial district. The fractions used for items (2) and (4) are computed by allotting to each county in a combined district an equal share of the House or Senate seat, *regardless* of the voting population of each of the counties that make up the election district.[2]

This formula is patently deficient in that it eliminates from consideration the relative voting power of the counties that are joined together in a single election district. As a result, the formula unrealistically assigns to Moore County one-third of a senator, in addition to its direct representative (*ante*, p. 5), although it must be obvious that Moore's voting strength in the Eighteenth Senatorial District is almost negligible. Since Moore County could cast only 2,340 votes of a total eligible vote of 30,478 in the senatorial district, it should in truth be considered as represented by one-fifteenth of a senator.

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[2] This formula is not clearly spelled out in the opinion, but it is necessarily inferred from the figures that are presented. Knox County, for example, is said to have a "total representation" of 7.25. It elects (1) three direct representatives (value 3.00); (2) one representative from a two-county district (value .50); (3) one direct senator (value 3.00); and (4) one senator in a four-county district (value .75). See Appendix, *ante*, pp. 13–15.

Assuming, *arguendo*, that any "total representation" figure is of significance, Moore's "total representation" should be 1.23, not 2.[3]

The formula suggested by my Brother CLARK must be adjusted regardless whether one thinks, as I assuredly do not, that the Federal Constitution requires that each vote be given equal weight. The correction is necessary simply to reflect the real facts of political life. It may, of course, be true that the floterial representative's "function is to represent the whole district" (*ante*, p. 7). But can it be gainsaid that so long as elections within the district are decided not by a county-unit system, in which each county casts one vote, but by adding the total number of individual votes cast for each candidate, the concern of the elected representatives will primarily be with the most populous counties in the district?

II.

I do not mean to suggest that *any* mathematical formula, albeit an "adjusted" one, would be a proper touchstone to measure the rationality of the present or of appellants' proposed apportionment plan. For, as the Table appended to my Brother CLARK's opinion so conclusively shows, whether one applies the formula he sug-

[3] If this "adjusted" formula for measuring "total representation" is applied to the other "horribles" cited in the concurring opinion (*ante*, p. 5), it reveals that these counties—which purportedly have equal "total representation" but distinctly unequal voting population—do not have the same "total representation" at all. Rather than having the same representation as Rutherford County, Moore County has only about 40% of what Rutherford has. Decatur County has only 55% of the representation of Carter County. While Loudon and Anderson Counties are substantially underrepresented, this is because of their proximity to Knox County, which outweighs their votes in the Sixth Senatorial District and in the Eighth Floterial District.

gests or one that is adjusted to reflect proportional voting strength within an election district, no plan of apportionment consistent with the principal policies of the Tennessee Constitution could provide proportionately equal "total representation" for each of Tennessee's 95 counties.

The pattern suggested by the appellants in Exhibits "A" and "B" attached to their complaint is said to be a "fair distribution" which accords with the Tennessee Constitution, and under which each of the election districts represents approximately equal voting population. But even when tested by the "adjusted" formula, the plan reveals gross "total representation" disparities that would make it appear to be a "crazy quilt." For example, Loudon County, with twice the voting population of Humphreys County would have *less* representation than Humphreys, and about one-third the representation of Warren County, which has only 73 more voters. Among the more populous counties, similar discrepancies would appear. Although Anderson County has only somewhat over 10% more voters than Blount County, it would have approximately 75% more representation. And Blount would have approximately two-thirds the representation of Montgomery County, which has about 13% *less* voters.[4]

III.

The fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula

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[4] These disparities are as serious, if not more so, when my Brother CLARK's formula is applied to the appellants' proposal. For example, if the nine counties chosen by him as illustrative are examined as they would be represented under the appellants' distribution, Moore County, with a voting population of 2,340, is given more electoral strength than Decatur County, with a voting population of 5,563. Carter County (voting population 23,302) has 20% *more* "total representation" than Anderson County (voting population 33,990), and 33% *more* than Rutherford County (voting population 25,316).

used, but in the failure to take account of the fact that a multitude of legitimate legislative policies, along with circumstances of geography and demography, could account for the seeming electoral disparities among counties. The principles set out in the Tennessee Constitution are just some of those that were deemed significant. Others may have been considered and accepted by those entrusted with the responsibility for Tennessee's apportionment. And for the purposes of judging constitutionality under the Equal Protection Clause it must be remembered that what is controlling on the issue of "rationality" is not what the State Legislature may *actually* have considered but what it may be *deemed* to have considered.

For example, in the list of "horribles" cited by my Brother CLARK (*ante*, p. 5), *all* the "underrepresented" counties are semiurban: all contain municipalities of over 10,000 population.[5] This is not to say, however, that the presence of any such municipality within a county necessarily demands that its proportional representation be reduced in order to render it consistent with an "urban versus rural" plan of apportionment. Other considerations may intervene and outweigh the Legislature's desire to distribute seats so as to achieve a proper balance between urban and rural interests. The size of a county, in terms of its total area, may be a factor.[6] Or the location within a county of some major industry may be

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[5] Murfreesboro, Rutherford County (pop. 16,017); Elizabethton, Carter County (pop. 10,754); Oak Ridge, Anderson County (pop. 27,387). Tennessee Blue Book, 1960, pp. 143–149.

[6] For example, Carter and Washington Counties are each approximately 60% as large as Maury and Madison Counties in terms of square miles, and this may explain the disparity between their "total representation" figures.

thought to call for dilution of voting strength.[7] Again, the combination of certain smaller counties with their more heavily populated neighbors in senatorial or "floterial" districts may result in apparent arithmetic inequalities.[8]

More broadly, the disparities in electoral strength among the various counties in Tennessee, both those relied upon by my Brother CLARK and others, may be accounted for by various economic,[9] political,[10] and geo-

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[7] For example, in addition to being "semi-urban," Blount County is the location of the City of Alcoa, where the Aluminum Company of America has located a large aluminum smelting and rolling plant. This may explain the difference between its "total representation" and that of Gibson County, which has no such large industry and contains no municipality as large as Maryville.

[8] For example, Chester County (voting population 6,391) is one of those that is presently said to be overrepresented. But under the appellants' proposal, Chester would be combined with populous Madison County in a "floterial district" and with four others, including Shelby County, in a senatorial district. Consequently, its total representation according to the Appendix to my Brother CLARK's opinion would be .19. (*Ante*, p. 13.) This would have the effect of disenfranchising all the county's voters. Similarly, Rhea County's almost 9,000 voters would find their voting strength so diluted as to be practically nonexistent.

[9] For example, it is primarily the eastern portion of the State that is complaining of malapportionment (along with the Cities of Memphis and Nashville). But the eastern section is where industry is principally located and where population density, even outside the large urban areas, is highest. Consequently, if Tennessee is apportioning in favor of its agricultural interests, as constitutionally it was entitled to do, it would necessarily reduce representation from the east.

[10] For example, sound political reasons surely justify limiting the legislative chambers to workable numbers; in Tennessee, the House is set at 99 and the Senate at 33. It might have been deemed desirable, therefore, to set a ceiling on representation from any single county so as not to deprive others of individual representation. The

graphic [11] considerations. No allegation is made by the appellants that the existing apportionment is the result of any other forces than are always at work in any legislative process; and the record, briefs, and arguments in this Court themselves attest to the fact that the appellants could put forward nothing further at a trial.

By disregarding the wide variety of permissible legislative considerations that may enter into a state electoral apportionment my Brother CLARK has turned a highly complex process into an elementary arithmetical puzzle. It is only by blinking reality that such an analysis can stand and that the essentially legislative determination can be made the subject of judicial inquiry.

IV.

Apart from such policies as those suggested which would suffice to justify particular inequalities, there is a further consideration which could rationally have led the Tennessee Legislature, in the exercise of a deliberate choice, to maintain the status quo. Rigidity of an apportionment pattern may be as much a legislative policy decision as is a provision for periodic reapportionment. In the interest of stability, a State may write into its fundamental law a permanent distribution

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proportional disrepancies among the four counties with large urban centers may be attributable to a corecious policy of limiting representation in this manner.

[11] For example, Moore County is surrounded by four counties each of which have sufficient voting population to exceed two-thirds of the average voting population per county (which is the standard prescribed by the Tennessee Constitution for the assignment of a direct representative), thus qualifying for direct representatives. Consequently Moore County must be assigned a representative of its own despite its small voting population because it cannot be joined with any of its neighbors in a multicounty district, and the Tennessee Constitution prohibits combining it with nonadjacent counties. See note 1, *supra*.

of legislators among its various election districts, thus forever ignoring shifts in population. Indeed, several State have achieved this result by providing for minimum and maximum representation from various political subdivisions such as counties, districts, cities, or towns. See Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Probs. (1952), 364, 368–372.

It is said that one "cannot find any rational standard" in what the Tennessee Legislature has failed to do over the past 60 years. But surely one need not search far to find rationality in the Legislature's continued refusal to recognize the growth of the urban population that has accompanied the development of industry over the past half decade. The existence of slight disparities between rural areas does not overcome the fact that the foremost apparent legislative motivation has been to preserve the electorate strength of the rural interests notwithstanding shifts in population. And I understand it to be conceded by at least some of the majority that this policy is not rendered unconstitutional merely because it favors rural voters.

Once the electoral apportionment process is recognized for what it is—the product of legislative give-and-take and of compromise among policies that often conflict—the relevant constitutional principles at once put these appellants out of the federal courts.